

which was arbitrary, discriminatory and unreasonable. It flew in the face of facts developed at the hearing and, without any showing of adequate cause therefor, it deprived the appellees of the use of part of their property for which it was best suited. Here we find elements of a decision being based upon a plebiscite of neighbors, which is not permissible; and finally, and here perhaps most important of all, of an effort to create a no man's land or buffer zone in property of the appellees for the benefit of others by preventing the appellees from using their property for any of the purposes for which it is peculiarly suitable. That, too, is not permissible."

In the case of Montgomery County Council vs. Scrimgeour, 127 A.2d 528, the Court of Appeals of Maryland again stated the proposition that a plebiscite of a neighborhood does not determine zoning. The court went on to state that a court shall reverse zoning action taken by a legislative body where there are no grounds for a reasonable debate and where the action of the zoning authorities was arbitrary, capricious, discriminatory or illegal.

In the case of Benner vs. Tribbit, 190 Md.6, 57 A.2d 346, the Court of Appeals again discussed legislative action by the use of a plebiscite of neighbors, and the court stated that such action is beyond the powers of the legislative body. The Court went on to state that where a municipal corporation exercises its police power, it must act impartially, and restrictions on the use of private property must be reasonably necessary to public welfare and consistent with the authority vested in the said municipal corporation.

In the case of Boyce vs. Sembly, 25 Md.App. 43, 334 A.2d 137, the Court of Special Appeals of Maryland discussed the elements relating to a comprehensive zoning map and elements

necessary for determining error in said map. Although the Court acknowledged the presumption of validity accorded to comprehensive zoning, this validity is overcome by the establishment of error or mistake. The Court stated that this presumption is overcome when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive zoning were invalid. In our view, the evidence presented in the case at bar clearly establish invalid assumptions or premises relied upon by the Council, or arbitrary and capricious action. Any one of the errors established in the evidence, and referred to herein, could constitute the probative evidence suggested by the Court. The Court went on to further state that error can be established by showing that at the time of the comprehensive zoning the council failed to take into account then existing facts, or projects or trends which are reasonably foreseeable of fruition in the future so that the council's action was premised initially on a misapprehension. They further stated that error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the council's initial views were incorrect. The Court further quoted from the case of Rockvill vs. Stone, 270 Md. 655, 319 A.2d 536 as follows:

"On the question of original mistake, the Court has held that when the assumption upon which a particular use is predicated proves, with the passage of time, to be erroneous, this is sufficient to authorize a re-zoning."

Although the Court further reasoned that it is presumed

as a part of the presumption of validity accorded comprehensive zoning that at the time of the adoption of the Map the council had before it and did, in fact, consider all the relevant facts and circumstances then existing, we respectfully submit that a responsible County Council would not have approved a Land Use Map which gave B.L. uses on D.R. 5.5 property as the Map gave the Church, nor would the County Council in a responsible way have approved a map which gave commercial uses to the Chesapeake Building on D.R. 5.5 property. Also, in allowing and creating councilmanic courtesy, the County Council was giving up their responsibility, their right and their duty to review all districts in order to determine the types of errors as existed in this case.

It is additionally important to emphasize herein that neither the County nor the citizens who are involved in this case presented any expert who controverted, in any way, the expert testimony presented by the Petitioner. Although Diane Itter was presented as a "County Planner", Ms. Itter admitted that she was not involved with the Land Use Map of 1988, and she was merely trying to explain some of the actions previously taken. Ms. Itter's frank admissions of invalid actions by the Planning Staff, Planning Board and County Council were shocking. She stated that the Southland Hills Association dictated their boundary lines which were adopted by all approving bodies including the County Council. Ms. Itter discussed the so-called "Towson Plans" utilized as a foundation which were admitted by her to be one obsolete 1979

plan and one plan which had never been adopted by anyone other than Barbara Bachur who appointed the advisory committee which developed the Plan. Although this Advisory Committee contained a member, or members, from the community involved, there was no evidence that there was any attempt to create any balanced representation to such biased view. Also, Ms. Itter admitted that this new plan had not been approved.

The position of Ms. Bachur that the zoning on the subject property shall never be changed until Southland Hills Association says it can was clearly confirmed by the testimony in this case and constitutes an erroneous foundation for the adoption of the Land Use Map of 1980 based upon this premise as applied to the subject property.

In the treatise, 4 American Law of Zoning (3rd) 192, the treatise in reviewing the cases applicable to the case at bar stated that there is common agreement on the proposition that any zoning plan must be continually re-examined and revised, and a plan is one for the development of a dynamic community which can not be fixed and immutable.

As a final issue, the Petitioner suggests that the R-O Zone adopted in Baltimore County is a "floating zone" in that the granting of a reclassification for the R-O Zone does not immediately change the zoning on the property. It remains for other authorities to grant the conversion to a use authorized under the R-O "floating zone".

In the application of R-O Zoning, as it might apply to

the subject property, the property would still remain D.R. 5.5 Zoning until approved for some other authorized use. In this regard, we respectfully submit a "floating zone" is not subject to the same rules as under other zoning reclassifications. An example of the difference could be demonstrated when a piece of property is changed from a D.R. 5.5. Zone to a B-L Zone. When this reclassification is made, the property can no longer be used for residential purposes without a further change in zoning. This idea of a "floating zone" has been discussed by the Court of Appeals of Maryland previously and is quite enlightening in that the issue has never been raised before involving the R-O Zone in any Courts in the state to our knowledge. However, the Court of Appeals of Maryland has previously discussed "floating zones" such as in the case of Fitzgerald vs. Montgomery County, 37 Md.App. 148, 376 A.2d 1125, where the Court stated that the "change or mistake" rule is inapplicable to a floating zone.

In the case of Knudsen vs. Montgomery County Council, 241 Md.436, 217 A.2d 97, the Court of Appeals of Maryland discussed the "floating zone", and also stated that the "mistake-change" rule does not apply in considering reclassification of the land applicable to a floating zone.

Although we sincerely believe that there is now strong evidence of error, or mistake, in connection with the Land Use Map of 1988 in connection with its application upon the subject property, an important issue that the Board of Appeals might want to consider is the question of the theory applicable to the "floating zone". However, we emphasize that

any conclusion in connection with this special application would not be necessary in this case in view of what we believe to be overwhelming evidence to support a Board decision to re-classify the subject property to R-O Zoning.

We appreciated the opportunity to present to you our views of the legal applications to the facts in this case, and we stand ready to offer any other legal support on any issues that the Board of Appeals might desire to have expanded in this case.

We believe, in summary, that the evidence of error in this case is substantial in order to establish credible evidence to show mistake, or error, in connection with the Land Use Map of 1988 as it relates to the area of the subject property.

Respectfully submitted,

HARRY S. SHAPIRO  
400 W. Pennsylvania Avenue  
Towson, Maryland 21204  
(301) 825-0110  
Attorney for F&S Limited Partnership

I HEREBY CERTIFY that on this 5 day of Dec., 1989 a copy of the foregoing Memorandum of Petitioner, F&S Limited Partnership was mailed to Phyllis Friedman, Esquire, People's Counsel for Baltimore County, Old Courthouse, Towson, Maryland 21204, and John Murphy, Esquire, 516 North Charles Street, Baltimore, Maryland 21201, Attorney for Southland Hills Improvement Association.

HARRY S. SHAPIRO

BOARD OF APPEALS

\* APPLICATION OF

OF

\* F. & S. PARTNERSHIP

BALTIMORE COUNTY

\* R 89-459; NO. 9, CYCLE 1

MEMORANDUM OF LAW

The Southland Hills Improvement Association of Baltimore County, Inc., Charles Culbertson, Robert Lindsay, Bert Boehm, Martin Eby and Matt Nolan, submit the following points of law for consideration by the Board:

1. The work done to convert the property into offices. F. & S. claims that it is unfair not to grant the office zoning since they undertook the office renovations based upon the rezoning granted back in 1980. This point was specifically ruled upon by the Court of Special Appeals in Case No. 1352, attached. In that case the Court noted that the renovations were undertaken by F. & S. while the zoning decision was on appeal, and that the rezoning was ultimately reversed by the Court of Special Appeals. The Court held that to allow F. & S. to claim that this required the zoning of the property for office use would "result in the virtual destruction of the appellate process".

2. The absence of any relevant evidence. The test for mistake is set forth in this quotation from the case of Boyce v. Sembly, 25 Md. App. 43, 52 (1975):







IN THE MATTER OF THE APPLICATION OF F & S LIMITED PARTNERSHIP FOR A ZONING RECLASSIFICATION ON PROPERTY LOCATED ON THE SOUTH SIDE OF WEST CHESAPEAKE AVENUE, 95 FEET EAST OF CENTERLINE OF FLORIDA AVENUE (307 W. CHESAPEAKE AVENUE) FROM D.R. 5.3 TO R.O. 9TH ELECTION DISTRICT 4TH COUNCILMANIC DISTRICT

NOTICE OF APPEAL

Please note an appeal to the Circuit Court for Baltimore County from the Opinion and Order of the County Board of Appeals under date of February 14, 1990, in the above captioned matter.

Phyllis Cole Friedman  
Phyllis Cole Friedman  
People's Counsel for Baltimore County

Peter Max Zimmerman  
Deputy People's Counsel  
Room 304, County Office Building  
111 W. Chesapeake Avenue  
Towson, Maryland 21204  
(301) 887-3188

I HEREBY CERTIFY that on this 21st day of March, 1990, a copy of the foregoing Notice of Appeal was served on the Administrative Secretary, County Board of Appeals, Room 315, County Office Bldg., 111 W. Chesapeake Ave., Towson, MD 21204; and a copy mailed to Harry S. Shapiro, Esquire, 400 W. Pennsylvania Ave., Towson, MD 21204; and John C. Murphy, Esquire, 516 N. Charles St., Baltimore, MD 21201.

Phyllis Cole Friedman  
Phyllis Cole Friedman

IN THE MATTER OF THE APPLICATION OF F & S LIMITED PARTNERSHIP FOR A ZONING RECLASSIFICATION ON PROPERTY LOCATED ON THE SOUTH SIDE OF WEST CHESAPEAKE AVENUE, 95 FEET EAST OF CENTERLINE OF FLORIDA AVENUE (307 W. CHESAPEAKE AVENUE) FROM D.R. 5.3 TO R.O. 9TH ELECTION DISTRICT 4TH COUNCILMANIC DISTRICT

PETITION ON APPEAL

People's Counsel for Baltimore County, Protestant below and Appellant herein, having heretofore filed a Notice of Appeal from the Opinion and Order of the County Board of Appeals under date of February 14, 1990, files this Petition on Appeal setting forth the grounds upon which this Appeal is taken, viz:

That the County Board of Appeals had no legally sufficient evidence upon which to base its conclusion in the above-captioned matter, and therefore their Order passed herein is illegal, arbitrary, and capricious.

WHEREFORE, People's Counsel prays that the Order of the Board of Appeals of Baltimore County under date of February 14, 1990 be reversed, and the petition denied.

Phyllis Cole Friedman  
Phyllis Cole Friedman  
People's Counsel for Baltimore County

Peter Max Zimmerman  
Deputy People's Counsel  
Room 304, County Office Building  
111 W. Chesapeake Avenue  
Towson, Maryland 21204  
(301) 887-3188

- 2 -

I HEREBY CERTIFY that on this 21st day of March, 1990, a copy of the foregoing Petition on Appeal was served on the Administrative Secretary, County Board of Appeals, Room 315, County Office Bldg., 111 W. Chesapeake Ave., Towson, MD 21204; and a copy mailed to Harry S. Shapiro, Esquire, 400 W. Pennsylvania Ave., Towson, MD 21204; and John C. Murphy, Esquire, 516 N. Charles St., Baltimore, MD 21201.

Phyllis Cole Friedman  
Phyllis Cole Friedman

IN THE MATTER OF THE APPLICATION OF F & S LIMITED PARTNERSHIP FOR A ZONING RECLASSIFICATION ON PROPERTY LOCATED ON THE SOUTH SIDE OF WEST CHESAPEAKE AVENUE, 95 FEET EAST OF CENTERLINE OF FLORIDA AVENUE (307 W. CHESAPEAKE AVENUE) FROM D.R. 5.3 TO R.O. 9TH ELECTION DISTRICT 4TH COUNCILMANIC DISTRICT

CERTIFICATE OF NOTICE

Madam Clerk:

Pursuant to the provisions of Rule B-2(d) of the Maryland Rules of Procedure, William T. Hackett, Michael B. Sauer, and Harry E. Buchheister, Jr., constituting the County Board of Appeals of Baltimore County, have given notice by mail of the filing of the appeal to the representative of every party to the proceeding before it; namely, Phyllis C. Friedman, Esquire, People's Counsel for Baltimore County, Room 304, County Office Building, Towson, MD 21204, Plaintiff; John C. Murphy, Esquire, 516 N. Charles Street, Baltimore, MD 21201, Counsel for Protestants; Southland Hills Improvement Association, et al, 408 Dixie Drive, Towson, MD 21204, Protestants; Harry S. Shapiro, Esquire, 400 W. Penn. Ave., Towson, MD 21204, Counsel for Petitioner; F & S Ltd. Partnership, c/o Howard L. Frey, G.P., 307 W. Chesapeake Ave., Towson, MD 21204, Petitioner; and Arnold G. Foreman, Esquire, c/o County Board of Appeals, Room 315, County Office Bldg., Towson, MD 21204, a copy of which Notice is attached hereto and prayed that it may be made a part hereof.

Linda Lee M. Kuszmaul  
Linda Lee M. Kuszmaul, Legal Secretary  
County Board of Appeals of Baltimore County, Room 315, County Office Bldg., Towson, MD 21204 (301) 887-3180

I HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has been mailed to Phyllis C. Friedman, Esquire, People's Counsel for Baltimore County,

F & S Ltd. Partnership, File No. 90-CG-984  
Case No. R-89-459

Room 304, County Office Building, Towson, MD 21204, Plaintiff; John C. Murphy, Esquire, 516 N. Charles Street, Baltimore, MD 21201, Counsel for Protestants; Southland Hills Improvement Assoc., et al, 408 Dixie Drive, Towson, MD 21204, Protestants; Harry S. Shapiro, Esquire, 400 W. Penn. Ave., Towson, MD 21204, Counsel for Petitioner; F & S Ltd. Partnership, c/o Howard L. Frey, G.P., 307 W. Chesapeake Ave., Towson, MD 21204, Petitioner; and Arnold G. Foreman, c/o County Board of Appeals, Room 315, County Office Bldg., Towson, MD 21204 on this 21st day of March, 1990.

Linda Lee M. Kuszmaul  
Linda Lee M. Kuszmaul, Legal Secretary  
County Board of Appeals of Baltimore County



County Board of Appeals of Baltimore County  
COUNTY OFFICE BUILDING, ROOM 315  
111 W. CHESAPEAKE AVENUE  
TOWSON, MARYLAND 21204  
(301) 887-3180

March 21, 1990

Phyllis C. Friedman, Esquire  
People's Counsel for Baltimore County  
Room 304, County Office Bldg.  
111 W. Chesapeake Avenue  
Towson, Maryland 21204

Re: Case No. R-89-459 (F & S Ltd. Partnership)

Dear Ms. Friedman:

In accordance with Rule B-7(a) of the Rules of Procedure of the Court of Appeals of Maryland, the County Board of Appeals is required to submit the record of proceedings of the appeal which you have taken to the Circuit Court for Baltimore County in the above-entitled matter within thirty days.

The cost of the transcript of the record must be paid by you. In addition, the cost incurred for certified copies of other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court not later than thirty days from the date of any petition you file in Court, in accordance with Rule B-7(a).

Enclosed is a copy of the Certificate of Notice which has been filed in the Circuit Court.

Very truly yours,

Linda Lee M. Kuszmaul  
Linda Lee M. Kuszmaul  
Legal Secretary

Encl.



County Board of Appeals of Baltimore County  
COUNTY OFFICE BUILDING, ROOM 315  
111 W. CHESAPEAKE AVENUE  
TOWSON, MARYLAND 21204  
(301) 887-3180

March 21, 1990

Harry S. Shapiro, Esq.  
400 W. Pennsylvania Avenue  
Towson, Maryland 21204

Re: Case No. R-89-459 (F & S Ltd. Partnership)

Dear Mr. Shapiro:

Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Linda Lee M. Kuszmaul  
Linda Lee M. Kuszmaul  
Legal Secretary

Encl.  
cc: John C. Murphy, Esquire  
Southland Hills Impr. Assoc., et al  
F & S Ltd. Partnership  
Mr. James Earl Kraft  
Ms. Sue Schenning  
P. David Fields  
Pat Keller  
J. Robert Haines  
Ann M. Nastarowicz  
James E. Dyer  
W. Carl Richards, Jr.  
Docket Clerk - Zoning  
Arnold Jablon, County Attorney

IN THE MATTER OF THE APPLICATION OF F & S LIMITED PARTNERSHIP FOR A ZONING RECLASSIFICATION ON PROPERTY LOCATED ON THE SOUTH SIDE OF WEST CHESAPEAKE AVENUE, 95 FEET EAST OF CENTERLINE OF FLORIDA AVENUE (307 W. CHESAPEAKE AVENUE) FROM D.R. 5.3 TO R.O. 9TH ELECTION DISTRICT 4TH COUNCILMANIC DISTRICT

CERTIFICATE OF NOTICE

Madam Clerk:

Pursuant to the provisions of Rule B-2(d) of the Maryland Rules of Procedure, William T. Hackett, Michael B. Sauer, and Harry E. Buchheister, Jr., constituting the County Board of Appeals of Baltimore County, have given notice by mail of the filing of the appeal to the representative of every party to the proceeding before it; namely, John C. Murphy, Esq., 516 N. Charles St., Baltimore, MD 21201, Counsel for Plaintiffs; Southland Hills Impr. Assoc., et al, 408 Dixie Dr., Towson, MD 21204, Plaintiffs; Harry S. Shapiro, Esq., 400 W. Penn. Ave., Towson, MD 21204, Counsel for Petitioner; F & S Ltd. Partnership, c/o Howard L. Frey, G.P., 307 W. Chesapeake Ave., Towson, MD 21204, Petitioner; Phyllis C. Friedman, Esq., People's Counsel for Baltimore County, Room 304, County Office Bldg., Towson, MD 21204; and Arnold G. Foreman, Esquire, c/o County Board of Appeals, Room 315, County Office Bldg., Towson, MD 21204, a copy of which Notice is attached hereto and prayed that it may be made a part hereof.

Linda Lee M. Kuszmaul  
Linda Lee M. Kuszmaul, Legal Secretary  
County Board of Appeals of Baltimore County  
Room 315, County Office Bldg., Towson, MD 21204 (301) 887-3180

I HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has been mailed to John C. Murphy, Esq., 516 N. Charles St., Baltimore, MD 21201, Counsel for Plaintiffs; Southland Hills Improvement Assoc., et al, 408 Dixie Drive,



Towson, MD 21204, Plaintiffs; Harry S. Shapiro, Esq., 400 W. Penn. Ave., Towson, MD 21204, Counsel for Petitioner; F & S Ltd. Partnership, c/o Howard L. Frey, G.P., 307 W. Chesapeake Ave., Towson, MD 21204, Petitioner; Phyllis C. Friedman, Esq., People's Counsel for Baltimore County, Room 304, County Office Bldg., Towson, MD 21204; and Arnold G. Foreman, Esq., c/o County Board of Appeals, Room 315, County Office Bldg., Towson, MD 21204 on this 16th day of March, 1990.

*Linda Lee M. Kuszmaul*  
Linda Lee M. Kuszmaul, Legal Secretary  
County Board of Appeals of Baltimore County



County Board of Appeals of Baltimore County  
COUNTY OFFICE BUILDING, ROOM 315  
111 W. CHESAPEAKE AVENUE  
TOWSON, MARYLAND 21204  
(301) 887-3180

March 16, 1990

John C. Murphy, Esquire  
516 N. Charles Street  
Baltimore, Maryland 21201

Re: Case No. R-89-459  
(F & S Ltd. Partnership)

Dear Mr. Murphy:

In accordance with Rule B-7(a) of the Rules of Procedure of the Court of Appeals of Maryland, the County Board of Appeals is required to submit the record of proceedings of the appeal which you have taken to the Circuit Court for Baltimore County in the above-entitled matter within thirty days.

The cost of the transcript of the record must be paid by you. In addition, the cost incurred for certified copies of other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court not later than thirty days from the date of any petition you file in Court, in accordance with Rule B-7(a).

Enclosed is a copy of the Certificate of Notice which has been filed in the Circuit Court.

Very truly yours,

*Linda Lee M. Kuszmaul*  
Linda Lee M. Kuszmaul, Legal Secretary

Encl.

cc: Southland Hills Improvement Assoc., et al



County Board of Appeals of Baltimore County  
COUNTY OFFICE BUILDING, ROOM 315  
111 W. CHESAPEAKE AVENUE  
TOWSON, MARYLAND 21204  
(301) 887-3180

March 16, 1990

Harry S. Shapiro, Esquire  
400 W. Pennsylvania Ave.  
Towson, Maryland 21204

Re: Case No. R-89-459 (F & S Ltd. Partnership)

Dear Mr. Shapiro:

Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

*Linda Lee M. Kuszmaul*  
Linda Lee M. Kuszmaul, Legal Secretary

Encl.

cc: F & S Ltd. Partnership  
People's Counsel for Baltimore County  
Mr. James Earl Kraft  
Ms. Sue Schenning  
P. David Fields  
Pat Keller  
J. Robert Haines  
Ann M. Nastarowicz  
James E. Dyer  
W. Carl Richards, Jr.  
Docket Clerk - Zoning  
Arnold Jablon, County Attorney

BOARD OF APPEALS

\* APPLICATION OF

OF

\* F. & S. PARTNERSHIP

BALTIMORE COUNTY

\* R 89-459; NO. 9, CYCLE 1

NOTICE OF APPEAL

Please enter an appeal to the Circuit Court for Baltimore County on behalf of The Southland Hills Improvement Association of Baltimore County, Inc., 408 Dixie Drive, Towson 21204, Charles Culbertson, 412 Carolina Road, Towson, Md. 21204, Robert Lindsay, 413 Georgia Court, Towson 21204, Bert Boehm, 200 Bosley Avenue, Towson 21204, Martin Eby, 15 Florida Road, Towson 21204, and Matt Nolan, 410 Alabama Road, Towson 21204, from the Opinion and Order of the County Board of Appeals of Baltimore County dated February 14, 1990 granting the reclassification of 307 W. Chesapeake Avenue from DR 5.5 to R.O.

*John C. Murphy*  
John C. Murphy

516 N. Charles St.

Baltimore, Md. 21201

301-625-4828

Attorney for the Southland  
Hills Improvement Association  
of Baltimore County, Inc.,  
Charles Culbertson, Robert  
Lindsay, Bert Boehm, Martin  
Eby, and Matt Nolan

PETITION OF APPEAL

Appellants submit the following Petition of Appeal:

1. Appellants. The individual Appellants are owners and residents of nearby properties who will be specially and adversely affected by the rezoning of the subject property. The corporate Appellant is an association composed of owners and residents of the subdivision in which the subject property is located. The individual Appellants and a representative of the corporate Appellant appeared and testified at the hearing and they are aggrieved by the decision which is the subject of the appeal.
2. Action appealed. The action appealed is the rezoning of the property at 307 W. Chesapeake Avenue from DR 5.5 to R0-Residential Office.
3. Errors committed by the County Board of Appeals:
  - A. The Board granted the rezoning without the existence of an actual and basic mistake in the existing zoning of the property.
  - B. The Board granted the rezoning contrary to the rule of res-adjudicata which prevents the relitigation of facts determined in prior judicial and administrative proceedings;
  - C. The Board granted the rezoning contrary to the change-mistake rule;
  - D. The Board failed to make adequate findings of fact;
  - E. The decision of the Board was otherwise arbitrary and capricious and contrary to law.

WHEREFORE, Appellants pray that the decision of the Board be reversed and that the DR 5.5 zoning be restored to the subject property.

*John C. Murphy*  
John C. Murphy  
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 16 day of March, 1990, prior to the filing with the Clerk of the Circuit Court, I delivered a copy of the foregoing Notice of Appeal and Petition of Appeal to the Baltimore County Board of Appeals, Courthouse, Towson, Md. 21204, and mailed a copy to Harry S. Shapiro, Esq., 400 W. Pennsylvania Ave., Towson, Md. 21204, attorney for F. & S., and to Phyllis Cole Friedman, Esq., People's Counsel, County Office Building, Towson, Md. 21204

*John C. Murphy*  
John C. Murphy

IN THE MATTER OF : BEFORE THE  
THE APPLICATION OF : COUNTY BOARD OF APPEALS  
F & S LIMITED PARTNERSHIP :  
FOR A ZONING RECLASSIFICATION ON : OF  
PROPERTY LOCATED ON THE SOUTH SIDE :  
WEST CHESAPEAKE AVENUE, 95 FEET EAST :  
OF CENTERLINE OF FLORIDA AVENUE : BALTIMORE COUNTY  
(307 W. CHESAPEAKE AVENUE) :  
FROM D.R. 5.5 TO R.O. : CASE NO. R-89-459  
9th ELECTION DISTRICT : Item #9, Cycle I - 1989  
4th COUNCILMANIC DISTRICT :

OPINION

This case once again comes before this Board on a Petition to reclassify the subject site from D.R. 5.5 to R.O. classification. The property's address is 307 W. Chesapeake Avenue and contains some .16 acre.

Mr. Shapiro representing F & S Limited Partnership in his opening statement noted that this matter has been ongoing for some 8 to 9 years and once again is petitioning to be allowed to use this property under the R.O. classification. He noted the history of the site which the Board will address later in this Opinion. Mr. John Murphy, representing the Protestants, in his opening statement proffered that the zoning line is properly drawn and the proper zoning should be D.R. 5.5.

Howard Frey, one of the property owners, testified as to his hoped-for use of the property and the condition of all the surrounding properties and his reasons why the D.R. 5.5 zoning is in error and that the correct zoning should be R.O.

Bernard Willeman, an expert planner, testified to his reasons why the D.R. 5.5 was in error and that the proper zoning should be R.O.

Bosley C. Tawney, an adjacent property owner, testified that he was in favor of the R.O. designation and that the R.O. use would be far more desirable than its present use as a rooming house.

Frederick P. Klaus, appraiser/realtor/developer, testified that he has reviewed the subject site and the general area, testified to all the neighboring uses, and stated his reasons why the D.R. 5.5 zoning was in error and that the proper zoning would be R.O. Petitioner then rested. The above testimony of these witnesses is only a part of the record and the record speaks for itself.

People's Counsel presented Diane Itter, the Community Planner from the Office of Planning & Zoning, who testified that it was her opinion the D.R. 5.5 zoning is in fact correct. She testified that this property is located within the environs of Southland Hills. She testified that there was little or no office use per se in Southland Hills and that it was her opinion the property should be used residentially. She further testified that the Planning staff recommended the retention of the D.R. 5.5.

Protestants presented Ms. Sue Schenning, President of the Southland Hills Improvement Association, who testified to the Association's opposition to the R.O. zoning and the reasons thereto. Other residents testifying in opposition to the R.O. zoning were Robert Lindsay, Wilbur Bayne, Charles Culbertson, Richard Parsons, and Michael Ruby. All of these residents were adamantly opposed to the R.O. classification and principally testified to their fear of further encroachment into the Southland Hills area with other then residential use. All of this testimony is part of the record which will speak for itself.

The Board in this Opinion must make mention of the history of this site. No other similar petition in the history of this Board has ever been more diligently or more properly pursued than this Petition. The present owners purchased this parcel in the summer of 1979. This was prior to the enactment of the legislation creating the R.O. zone. At the time of its purchase, there was pending a petition to reclassify the site from D.R. 5.5 to



D.R. 16 with a special exception to allow office use. Such was at that time the appropriate zoning procedure. The special exception and reclassification were granted, affirmed by the Board of Appeals and the Circuit Court, and in turn appealed to the Court of Special Appeals. The building at this time was completely renovated and the interior configuration altered from residential use to office use, and the office use undertaken. While this appeal was pending, the 1980 Comprehensive Map Process was completed. During this map process, this property was not made an issue in the 1980 map process, but since the office use was under appeal, the County Council maintained jurisdiction and classified the property once again D.R. 5.5. In light of this development, the Court of Special Appeals took due note thereof and reversed the Circuit Court and retained the D.R. 5.5 zoning. The office use at that time was then abandoned. A new petition was soon thereafter filed once again requesting the classification from D.R. 5.5 to the now existing R.O. classification, and was heard before the Board of Appeals. It should also be noted at this time that the Board of Appeals now has original jurisdiction over reclassification requests. The Board taking due notice of the very recent finding of the Court of Special Appeals denied the petition. The property owner now owns the building in which all aspects of residential use have been removed and the building is now altered to office use with no permission for such use. In order to arrive at some practical use for this site, the owner petitioned for a special exception to allow the use of the property as a rooming house. That special exception was granted and affirmed at the Circuit Court level and the Court of Special Appeals level, and is the present use of the subject site.

In 1986, a Petition for Reclassification from D.R. 5.5 to R.O. was heard by the Board of Appeals and the reclassification was granted. This deci-

sion was appealed to the Circuit Court and was affirmed by the Circuit Court. The Circuit Court decision was appealed to the Court of Special Appeals and was reversed by them retaining the D.R. 5.5 designation. It should be noted that the Court of Special Appeals in its reversal did not find a lack of evidence to support the decision of the Board on the issue of error but was critical of the substance of the Opinion of the Board, said Opinion not stating findings of fact so that the Court of Special Appeals could determine whether the Board's Opinion was based upon evidence. In the 1988 Comprehensive Map Process, the property's zoning designation was retained at D.R. 5.5. Once again, F & S Limited Partnership petitions for a zoning reclassification to allow them the use of their property as a residential office.

From the evidence and testimony and exhibits produced at this hearing, the facts indicate overwhelmingly that the present D.R. 5.5 zoning classification on this subject property is in error. This Board finds that the factual testimony and opinion testimony given by the property owner, Mr. Frey; Mr. Bernard Willeman, an expert in land planning and zoning; and Mr. Frederick Klaus, an appraiser, realtor and developer, supports the decision of this Board that the zoning is in error. The uncontradicted testimony establishes that this tiny piece of property is the only property located in the 300 block of Chesapeake Avenue which does not have office or some commercial use. This block is located directly west of Bosley Avenue and extends to Elmdale Avenue. All of the properties to the east of the subject property and on the same side of the street are being used as offices or commercially. The property directly next door on the same side of the street and to the east of the subject property is an enormous five-story office building with an enormous commercial parking lot. This office building has been at the property for over 15 years. Its

sheer height dwarfs the subject property and testimony indicated that the subject property is substantially sheltered from sunlight, since the office building is east of the property. The property next door to the west is used as a law office under Special Exception. Although the property zoning requires that the lawyer reside in the building, it does enjoy commercial use. On the north side of Chesapeake Avenue across the street from the property is a large parking lot belonging to a church. Testimony established that this lot is being used commercially. Parking spaces are being leased by the church to the public. In addition, the Zoning Maps disclose that except for the church the properties and neighborhood to the north of Chesapeake Avenue running from Bosley Avenue to Highland Avenue are zoned R.O. It is significant from the point of review of zoning impact that this R.O. zoning runs much further west to the north of Chesapeake Avenue than on the south side where the subject property is located.

This Board is of the opinion that the property owners are being denied a reasonable use of their property. It is clear from the testimony that the property no longer contains any value as a pure residence and to deny the owners a reasonable use of the property compatible with surrounding properties with commercial uses is inappropriate and in error. From the testimony and evidence received, the Board will find as a fact that the D.R. 5.5 zoning designation is in fact in error and that the proper zoning should be R.O. and will so order. The testimony and evidence presented clearly indicate this to be true, and that the retention of the D.R. 5.5 zoning is not only error but approaches rezoning by plebiscite by the Southland Hills Improvement Association. The Board will note that there are 306 property owners in Southland Hills but only 63 evidenced by signature or appearance their opposition to the R.O. zoning. Lengthy memorandums submitted and studied by this Board are part of the case history and a part of the case file.

ORDER

It is therefore this 14th day of February, 1990 by the County Board of Appeals of Baltimore County ORDERED that the Petition for Reclassification of the subject property from D.R. 5.5 to R.O. be and the same is GRANTED.

Any appeal from this decision must be made in accordance with Rules B-1 through B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS  
OF BALTIMORE COUNTY

William T. Hackett  
William T. Hackett, Chairman

Michael B. Gauer  
Michael B. Gauer

Harry E. Buchheister, Jr.  
Harry E. Buchheister, Jr.

F&S LIMITED PARTNERSHIP \* BEFORE THE BALTIMORE  
Petition for Zoning \* COUNTY BOARD OF APPEALS  
Reclassification \* Case No. CR-89-459

MEMORANDUM OF PETITIONER, F&S LIMITED PARTNERSHIP

The property in question is located at 307 West Chesapeake Avenue in Towson, Maryland. The 300 block of West Chesapeake Avenue is the first block from Bosley Avenue (a major six-lane highway designed as a beltway around Towson) where the County Courts Building exists. Every property has office or commercial use in said block, and the property located directly adjacent to the subject property at 305 West Chesapeake Avenue is a highrise office building consisting of 78,000 square feet of offices and a large parking lot, said building being known as the Chesapeake Building. The entire property occupied by the Chesapeake Building for offices and parking measures about 2 city blocks, and is a glass building which reflects much light at night.

The subject property contains approximately 2200 square feet of space, was used as rooming house at the time of purchase by the Petitioner in 1979, and is currently zoned and used as a rooming house.

Subsequent to 1979, the property was zoned D.R. 16 with a special exception for office use, was improved for the extent of approximately \$40,000.00, and was occupied by the partners of the Petitioner for such use.

Thereafter, under councilmanic courtesy utilized regularly by the Baltimore County Council and particularly in this case by Barbara F. Bachur, the County Councilperson from the District in question, the property was downshifted to D.R. 5.5 with a subsequent special exception for rooming house use.

In 1986, the Board of Appeals of Baltimore County rezoned the property to R-0 which was confirmed by the Circuit Court for Baltimore County. This decision was subsequently appealed to the Court of Special Appeals of Maryland which reversed said decision. The issue determined by the Board of Appeals, hereinafter referred to as the Board, in said case was based upon error in the Land Use map of 1984. In comments during the arguments before the Court of Special Appeals, argument was presented by the Appellee that the Board did not explain its decision with reference to the evidence in this case with sufficient clarity in order to establish the record for a review to the Courts. Reference was made to Section 2-58.1 of the Baltimore County Code (Supplement) which stated as follows:

"That the prospective reclassification of the property is warranted by that change or error. Any finding of such a change or error and any finding that the prospective reclassification is warranted may be made only upon consideration of factors relating to the purposes of the zoning regulations and maps, including, but not limited to, all of the following: Population trends; availability and adequacy of present and proposed transportation facilities, water-supply facilities, sewerage, solid-waste disposal facilities, schools, recreational facilities, and other public facilities, compatibility of uses generally allowable under the prospective classification with the present and projected

development or character of the surrounding area; any pertinent recommendation of the planning board or office of planning and zoning; and consistency of the current and prospective classifications with the master plan, the county plan for sewerage and water-supply facilities, and the capital program."

In other words, the Court of Special Appeals believed that the Board should have discussed, in their opinion, the effect of the evidence as same related to Section 2-58.1. It is also important to point out that the Court of Special Appeals did not find that there was no evidence to support the decision of the Board on the issue of error, but said Appellate body was merely criticizing the substance of the opinion of the Board. In effect, the Appellate Court enunciated the basic premise that the Agency's findings of fact must be stated clearly in the opinion so that the Courts have a basis for a review in order to determine whether or not the Board's opinion was based upon evidence in the case. The Court of Special Appeals further referred to the case of Ocean Hideaway Condominium Association vs. Boardwalk Plaza Venture, 68 Md.App. 650, 515 A.2d 485 where the Court of Special Appeals determined that the Ocean City Board of Zoning Appeals was required to render a finding of fact with respect to the standards required for such opinion in the City Code.

In the case now before the Board involving the 1988 Land Use Map for Baltimore County, the evidence is far stronger in our humble opinion than previously. It is also important to point out that this case is based upon the power of the Board of Appeals under Section 602 of the Baltimore County Charter which states:

"The County Board of Appeals shall have original and exclusive jurisdiction over all Petitions for Reclassification."

Also, it appears that res judicata does not apply in zoning cases where the "identity and subject matter" is the new map of 1988. The Court of Appeals has stated on numerous occasions that the identity and subject matter must be the same before a prior decision is deemed to be res judicata. In the case Boggs vs. Boggs, 138 Md. 422, a Court test came before the Court of Appeals of Maryland on the question of whether or not there could be res judicata as a result of actions between the same parties. The Court stated that the subsequent action involved facts that occurred subsequent to the prior decision which could not be considered res judicata in the second decision.

In the case at bar, the purpose of a Land Use Map every four years is to give objective consideration to changing times, trends and other facts and circumstances. If zoning were to be rigid for all time, there would be no need for any Land Use planning every four years. Different times require different considerations, and these considerations must be balanced for the protection of all the people. In the case of Muhly vs. County Council for Montgomery County, 218 Md. 543, 147 A.2d 735, the Court of Appeals of Maryland recognized that zoning can never be completely permanent. The power to change was granted to the Board of Appeals of Baltimore County by the people of this County when it adopted Section 602 of the County Charter as previously discussed herein.



"Unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not 'fairly debatable'."

The testimony of Bernard Willemain was that the the Council made a mistake when it failed to rezone the property for office use after it granted the zoning for the Chesapeake Building many years ago. Certainly the Chesapeake Building was known to the Council when it adopted the most recent zoning in 1988. The testimony of Fred Klaus again relied mainly on the Chesapeake Building. The only fact he said could not have been considered by the Council was the recent authorization for an office in the basement of the White residence. Since this was a special exception granted by the Zoning Commissioner pursuant to the authority granted by the Council, it cannot serve as the basis for a mistake. Put another way, the fact that the White residence has been granted permission to have an office in the basement does not prove that the zoning of the S. & B. property is in error. If anything, it shows there is a highly reasonable residential use for the property--a residence, or a combination of residence and office use.

3. The prior proceedings. This is the fourth time the Board as heard an application to change the zoning for this property to office use. Three times the Court of Special Appeals has ruled that there were not sufficient changes or evidence of mistake to

authorize a change. The opinions are attached. In case No. 1352, decided May 4, 1981, the court held that the proximity of the Chesapeake Building was not evidence of mistake--that the Council chose to draw the line at the F. & S. property, and this was no mistake. This case directly refutes the testimony of Bernard Willemain and Fred Klaus that the failure to follow the zoning for the Chesapeake Building constitutes a mistake.

In Case 676, decided February 10, 1984, the Court again upheld a finding that no change or mistake had occurred. This case specifically discussed the existence of the church parking lot, across the street. Finally, in case No. 216, decided October 26, 1987, the court again determined that there was no evidence of mistake. The Court held that it was uncontroverted that the physical condition of the property is plainly in view and must have been considered by the Council.

4. Conclusion. The Council has now zoned this property four times--1976, 1980, 1984 and 1988. There is no basis for overturning these legislative judgments. The only new argument made is that almost any use would be preferable to the present use of the property. F. & S. exhibits no shame or remorse in making this argument. The testimony was uncontroverted, even admitted by F. & S., that the present use of the property constitutes a nuisance to the community due to the abject neglect of the property by F. & S., the owners. If this is to be the basis for a change, then irresponsible landlords are encouraged. Southland Hills is certain that the Board will reject this approach.

3

*John C. Murphy*  
John C. Murphy  
516 N. Charles St.  
Baltimore, Md. 21201  
301-625-4828  
Attorney for the Southland  
Hills Improvement Association  
of Baltimore County, Inc.,  
Charles Culbertson, Robert  
Lindsay, Bert Boehm, Martin  
Eby, and Matt Nolan

CERTIFICATE OF SERVICE  
I HEREBY CERTIFY, that on this 22 day of Nov., 1989,  
I mailed a copy of the foregoing Memorandum to Harry S. Shapiro,  
Esq., 400 W. Pennsylvania Ave., Towson, Md. 21204, attorney for  
F. & S., and to Phyllis Cole Friedman, Esq., People's Counsel,  
County Office Building, Towson, Md. 21204

*John C. Murphy*  
John C. Murphy

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND  
No. 216  
September Term, 1987

PEOPLE'S COUNSEL FOR  
BALTIMORE COUNTY, ET AL

v.

F. & S. LIMITED PARTNERSHIP

Wilner  
Bishop  
Bell, Robert M.,  
JJ.

PER CURIAM

Filed: October 26, 1987

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND  
No. 1352  
September Term, 1981

#R-79-L-YP

PEOPLE'S COUNSEL FOR  
BALTIMORE COUNTY

v.

HOWARD L. FREY, ET AL.  
PLANNERY

Liss  
Wilner  
Neant,  
JJ.

PER CURIAM

Filed: May 8, 1981

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND  
No. 676  
September Term, 1983

F & S LIMITED PARTNERSHIP

v.

PEOPLES COUNSEL FOR BALTIMORE COUNTY,  
et. al.

Gilbert, C.J.  
Alpert  
Bell

JJ.

PER CURIAM

Filed: February 10, 1984

#R-83-63

OF CERTIORARI DENIED D. C.

PR-23

F&S LIMITED PARTNERSHIP, • BEFORE THE BALTIMORE  
Petition for Zoning • COUNTY BOARD OF APPEALS  
Reclassification • Case No. CR-89-459

MOTION FOR PROTECTIVE ORDER AND/OR TO QUASH  
ON REQUEST FOR SUBPOENA DUCES TECUM

Baltimore County, Maryland, a body corporate and politic of the State of Maryland, by Arnold Jablon, County Attorney and Michael McMahon, Assistant County Attorney, its attorneys, moves for a protective order and/or to quash the request for Subpoena Duces Tecum, and as grounds therefore assign as follows:

1. THE PRIVILEGE OF SPEECH AND DEBATE AFFORDS  
A COUNCILMAN IMMUNITY OR PRIVILEGE TO RESPOND  
TO A SUBPOENA DUCES TECUM.

The privilege of speech and debate relative to any legislative proceeding affords a County Councilman an immunity or privilege to refuse to answer any form of discovery in a civil case, including quasi-judicial proceedings before the County Board of Appeals. This immunity extends to a Subpoena Duces Tecum, a request for the production of document and any other form or type of discovery effort.

2. WHERE THE ACTIONS OF AN ADMINISTRATIVE AGENCY  
SUCH AS THE BOARD OF APPEALS ARE CLOTHED WITH  
THE INDICIA OF A JUDICIAL DETERMINATION, THEN  
ITS MEMBERS ARE ENTITLED TO ABSOLUTE JUDICIAL  
IMMUNITY INCLUDING AN IMMUNITY OR PRIVILEGE  
TO RESPOND TO A SUBPOENA DUCES TECUM.

Where an administrative agency's actions are clothed with the indicia of a judicial determination - witnesses testifying under oath, right of

cross-examination and a requirement to include a written decision on each application for relief, which includes thorough findings of fact and a conclusion based thereon - then the agency's members are entitled to absolute judicial immunity.

3. A Memorandum of Points and Authorities accompanies this Motion and is incorporated herein.

*Arnold Jablon*  
ARNOLD JABLON  
County Attorney

*Michael McMahon*  
MICHAEL MCMAHON  
Assistant County Attorney  
Courthouse - 2nd Floor  
Towson, MD 21204  
(301) 857-5669/4420

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 13th day of November 1989,  
a copy of the foregoing Motion for Protective Order and/or to Quash on  
Request for Subpoena Duces Tecum was hand-delivered to Harry S. Shapiro,  
Esq., 400 W. Pennsylvania Avenue, Towson, MD 21204.

*Michael McMahon*  
Michael McMahon

-2-



RE: PETITION FOR RECLASSIFICATION : BEFORE THE COUNTY BOARD OF APPEALS  
FROM D.R. 5.5 TO R-O ZONE  
S/S W. Chesapeake Ave., 95' : OF BALTIMORE COUNTY  
E of C/L Florida Ave.  
(307 W. Chesapeake Ave.) :  
9th Election District :  
4th Councilmanic District :  
F & S LIMITED PARTNERSHIP, : Zoning Case No. R-89-459  
Petitioner :  
: : : : :  
ENTRY OF APPEARANCE

Please enter the appearance of the People's Counsel in the above-captioned matter. Notices should be sent of any hearing dates or other proceedings in this matter and of the passage of any preliminary or final Order.

*Phyllis Cole Friedman*  
Phyllis Cole Friedman  
People's Counsel for Baltimore County

*Peter Max Zimmerman*  
Peter Max Zimmerman  
Deputy People's Counsel  
Room 304, County Office Building  
111 W. Chesapeake Avenue  
Towson, Maryland 21204  
(301) 867-2158

I HEREBY CERTIFY that on this 17th day of July, 1989, a copy of the foregoing Entry of Appearance was mailed to Harry S. Shapiro, Esquire, 400 W. Pennsylvania Ave., Towson, MD 21204, Attorney for Petitioner.

*Peter Max Zimmerman*  
Peter Max Zimmerman

The errors in the Land Use Map as it relates to the subject property, as well as the changes in the character of the area since the 1980 Land Use Map, are substantial and provide a strong foundation for support for the re-classification to the "Residential Office" zone for the subject property.

In addition to the foregoing record of error and changes in the neighborhood, the Petitioner submits that a great burden presently exists upon the subject property if it is allowed to remain in the D.R. 5.5 zoning. Prior to the 1979 hearing before the Board of Appeals, the subject property was in shambles as deterioration had reduced the property to a slum. The property was used for a communal-type boarding house with transients coming and going. Plaster was falling from walls and ceilings, holes existed in walls and ceilings, pipes were leaking, paint was peeling and flaking from inside and outside of the property, shutters were hanging loose and falling from the outside of the property, sidewalks and pathways were loose and cracked, the roof was leaking, the railing on the inside of the property leading to the second floor was loose, water and flooding conditions existed in the basement, shabby was overgrown, rainspouts were bent, cracked and falling from the property, and the property was generally crumbling in a state of disrepair.

In reliance upon the 1979 Board of Appeals proceedings, the property was converted as aforesaid and improved at a substantial expense to the Petitioner. The present physical structure strongly supports a residential-office use, and would be appropriate for the surroundings and an asset to the community in that a residential-office use would be limited under the law and provide a quiet and peaceful atmosphere in direct contrast to the noise and disruption to the community caused by the prior transients when a boarding house existed at the property.

No reasonable and appropriate residential use can be made of the property in view of its proximity to the Chesapeake Building and the other commercial uses in the block in question, because of the commercial parking lot across the street from the subject property and because of the changes in the character of the neighborhood due to the new "Residen-

PETITION FOR ZONING RE-CLASSIFICATION  
SPECIAL EXCEPTION AND/OR VARIANCE

TO THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition (1) that the zoning status of the herein described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an D.R. 5.5 zone to a Residential Office zone, for the reasons given in the attached statement; and (2) for a Special Exception, under the said Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property, for

and (3) for the reasons given in the attached statement, a variance from the following sections of the Zoning Law and Zoning Regulations of Baltimore County:

See "Exhibit A" for the reasons for the Petition outlined herein.

Property is to be posted and advertised as prescribed by The Baltimore County Code.

I, or we, agree to pay expenses of above Re-classification, Special Exception and/or Variance, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

|                                          |                                                                                                     |
|------------------------------------------|-----------------------------------------------------------------------------------------------------|
| Contract Purchaser:                      | Legal Owner(s):                                                                                     |
| (Type or Print Name)                     | F & S LIMITED PARTNERSHIP                                                                           |
| Signature                                | (Type or Print Name)                                                                                |
| Address                                  | Signature                                                                                           |
| City and State                           | Signature                                                                                           |
| Attorney for Petitioner:                 | Signature                                                                                           |
| HARRY S. SHAPIRO, Esquire                | 307 W. Chesapeake Avenue                                                                            |
| (Type or Print Name)                     | Address                                                                                             |
| Signature                                | Towson, Maryland 21204                                                                              |
| Address                                  | City and State                                                                                      |
| 400 W. Pennsylvania Avenue               | Name, address and phone number of legal owner, contract purchaser or representative to be contacted |
| Towson, Maryland 21204                   | HARRY S. SHAPIRO, Esquire                                                                           |
| City and State                           | Name                                                                                                |
| Attorney's Telephone No.: (301) 825-0110 | 400 W. Pennsylvania Ave., Towson, MD 21204                                                          |
|                                          | Address (301) 825-0110                                                                              |

BAC-Form 1

Residential Office" zone. It is important to further note that the subject property is only four properties from the corner of Bosley Avenue where the County Courthouse exists, and the "Residential Office" zoning appears to be the logical and reasonable zoning for the property.

Under Bill E 13-89 which adopted the "Residential Office" classification (referred to as R-O), a statement of legislative policy was set forth under Section 203.2. This Section states in part as follows:

"This R-O zoning classification is established, pursuant to the findings stated above, to accommodate houses converted to office buildings and some small Class B office buildings in predominantly residential areas or sites that, because of the adjacent commercial activity, heavy commercial traffic, or other similar factors, can no longer reasonably be restricted solely to uses allowable in moderate-density residential zones. It is intended that buildings and uses in R-O zones shall be highly compatible with the present or prospective uses of nearby residential property."

This statement of legislative policy clearly covers the subject property as all the elements set forth in the said policy relate here. The re-classification of the subject property to the R-O zone would be completely compatible with the neighborhood, and accomplish a just and equitable zoning. The error in the Land Use Map of 1980 and the changes in the character of the neighborhood substantially support the re-classification requested.

"EXHIBIT A"

REASONS FOR RE-CLASSIFICATION

The property in question is located at 307 W. Chesapeake Avenue in Towson, Maryland. The 500 block of W. Chesapeake Avenue is the first block from Bosley Avenue (a major six-lane highway designed as a beltway around Towson) where the County Courts Building exists. Every property (except one) has had office or commercial use in said block, and the property located directly adjacent to the subject property at 305 W. Chesapeake Avenue is a high-rise office building consisting of 78,000 square feet of offices and a large parking lot, the said building being known as the Chesapeake Building. The entire property occupied by the Chesapeake Building for offices and parking measures about two city blocks.

In November, 1979, a hearing was concluded by the Baltimore County Board of Appeals relating to a change in classification to D.R. 16 with a special exception for office use for the subject property. Subsequently, the said re-classification was granted by the Board of Appeals based upon error in the Land Use Map of 1976.

Improvements were made to the property converting same to office use, and an Occupancy Permit was granted by Baltimore County.

Thereafter, an Appeal was taken by the People's Counsel for Baltimore County to the Circuit Court for Baltimore County, and the Circuit Court for Baltimore County confirmed the decision of the Board of Appeals with reference to the D.R. 16 with a special exception for office use zoning.

After the said decision of the Circuit Court for Baltimore County, the People's Counsel for Baltimore County further appealed the case to the Court of Special Appeals of Maryland, which Court reversed the ruling of the Circuit Court for Baltimore County on grounds that there was insufficient evidence before the Board of Appeals as to the error in the Land Use Map of 1976.

At the time of the hearing before the Board of Appeals in November, 1979, no "Residential Office" zone existed in Baltimore County as said new zone was not adopted until the fall of 1980. Therefore,

Subsequent to the history as previously set forth in the first four pages herein, a Petition for Zoning Re-Classification was filed subsequent to the 1984 Land Use Map before the Board of Appeals of Baltimore County. The Board of Appeals determined that there was error in the 1984 Land Use Map which determination was confirmed by the Circuit Court for Baltimore County. Subsequently, the People's Counsel for Baltimore County took an Appeal to the Court of Special Appeals of Maryland where the Court of Special Appeals reversed the Circuit Court for Baltimore County on such decision.

It is important to note that the Court of Special Appeals did not find that there were insufficient facts to support the issues of error, but they believed that the Board of Appeals' Opinion did not recite the details necessary in said Opinion. Therefore, the Court of Special Appeals decision on the 1984 Land Use Map was technical in nature and not on the substance of the case before the Board of Appeals.

Under the Land Use Map of 1988, the Baltimore County Council continued to compound previous errors relating to its Land Use Maps, and its conclusions relating to the subject property contained new errors in procedure and substance.

These errors included the failure on the part of the County Council to recognize the continuing trends in the first and second blocks west of Bosley Avenue for commercial uses, the Council continued to "spot zone" the subject

the "Residential Office" zoning was never an issue in the prior Board of Appeals and Court proceedings.

At the time of the consideration of the 1980 Land Use Map by the County Council, no issue was before the County Council relating to "Residential Office" zoning for the subject property. Therefore, and in view of the complexity of the legal proceedings, the County Council merely established the prior D.R. 5.5 zoning for the property.

The complex chronology of events surrounding the legal proceedings relating to this property has left same in a position where it was converted to residential-office type use and cannot be used for any residential purposes under the D.R. 5.5 zoning. The conversion which was accomplished pursuant to a valid decision of the Court of Appeals of Maryland in the case of Swarthmore v. Kaestner, 258 Md. 517, 206 A.2d 341, has left the property without any practical ability to accommodate residential purposes.

Additionally, since the adoption of the "Residential Office" zoning in the fall of 1983, numerous properties farther to the west of the subject property have been re-zoned for the "Residential Office" zoning creating a change in character of the neighborhood in the several blocks west of Bosley Avenue. These properties have been changed on the inside, outside and have been occupied for residential-office uses.

None of the properties zoned for "Residential Office" use in the west Towson area had the commercial impact that the subject property has at this time. In addition to the large office building (Chesapeake Building) adjacent to the subject property, there is a large active commercial parking lot directly across the street from the subject property.

Another error in connection with the 1976 and 1980 Land Use Maps relates to the zoning line established along Central Avenue. This zoning line was erroneously drawn and even intruded upon the commercial use at the Chesapeake Building. In other words, part of the Chesapeake Building property was erroneously zoned D.R. 5.5 when no such zoning line could have been intended based upon the history of the use at the location.

property notwithstanding the high intensity of commercial uses surrounding the subject property; the Council admitted that it practiced councilmanic courtesy contrary to County and State law which constituted a violation of due process rights of the Petitioner; the Council refused arguments and facts presented that the Church parking lot at the corner of Central Avenue and Chesapeake Avenue was an illegal use as presently constituted; the Council refused to remedy the illegal parking lot at the Church property as aforesaid by corrections to the proposed map; and the County Council was otherwise guilty of error in its determinations relating to the subject property under the Land Use Map of 1988.

The Petitioner understands that the within proceeding is limited to issues of error in the Land Use Map of 1988 in view of the fact that Bill 446 adopted by the County Council in 1979 limited zoning re-classifications to error alone for matters within one year of the adoption of the Land Use Map.



**CERTIFICATE OF POSTING**  
ZONING DEPARTMENT OF BALTIMORE COUNTY  
Towson, Maryland

Case No. CR-89-459

District 9th Date of Posting 10-26-89

Posted for: Reclassification

Petitioner: F & S Limited Partnership

Location of property: S/S of Chesapeake Avenue, 85' E of  
the CR of Florida Avenue, 357 W Chesapeake Avenue

Location of Sign: Close front of 307 W Chesapeake Avenue

Remarks: See map of 307 W Chesapeake Avenue

Posted by: J. J. Smith Date of return: 11-3-89

Number of Signs: 1

**CERTIFICATE OF PUBLICATION**

TOWSON, MD., Nov 2, 1989

THIS IS TO CERTIFY, that the annexed advertisement was published in TOWSON TIMES, a weekly newspaper published in Towson, Baltimore County, Md., once in each of 2 successive weeks, the first publication appearing on Oct 25, 1989.

TOWSON TIMES,  
S. Zele Olson  
Publisher

NOTICE OF HEARING  
PETITION FOR ZONING RECLASSIFICATION  
Case Number: CR-89-459  
S/S W. Chesapeake Avenue, 95' E of c/l Florida Avenue  
Petitioner(s): F&S Limited Partnership

DESCRIPTION FOR RECLASSIFICATION  
Beginning for the same at a point on the south side of West Chesapeake Avenue, 60 feet wide, at the distance of 35 feet more or less measured easterly along the south side of West Chesapeake Avenue from the centerline of Florida Road running thence and binding on the south side of West Chesapeake Avenue South 76 Degrees 23 Minutes East 55.00 feet thence leaving the south side of West Chesapeake Avenue and running South 13 Degrees 26 Minutes East 125.00 feet to the place of beginning.

**NOTICE OF HEARING**  
PETITION FOR ZONING RECLASSIFICATION

Petition for Zoning Reclassification  
Case Number: CR-89-459  
S/S W. Chesapeake Avenue, 95' E of c/l Florida Avenue  
Petitioner(s): F&S Limited Partnership

DESCRIPTION FOR RECLASSIFICATION  
Beginning for the same at a point on the south side of West Chesapeake Avenue, 60 feet wide, at the distance of 35 feet more or less measured easterly along the south side of West Chesapeake Avenue from the centerline of Florida Road running thence and binding on the south side of West Chesapeake Avenue South 76 Degrees 23 Minutes East 55.00 feet thence leaving the south side of West Chesapeake Avenue and running South 13 Degrees 26 Minutes East 125.00 feet to the place of beginning.

Containing 0.16 acres of land, more or less.

Petition to reclassify the property from an D.R.-5.5 to an R.O. zone.

TIME: 10:00 a.m.  
DATE: WEDNESDAY, NOVEMBER 15, 1989  
LOCATION: Room 301, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland 21204

WILLIAM T. HACKETT, CHAIRMAN  
County Board of Appeals

Baltimore County  
Zoning Commissioner  
Office of Planning & Zoning  
Towson, Maryland 21204  
(301) 887-3233

Date: 11/9/89

Re: Petition for Zoning Re-classification  
CASE NUMBER: CR-89-459  
S/S W. Chesapeake Avenue, 95' E of c/l Florida Avenue  
307 W. Chesapeake Avenue  
9th Election District - 4th Councilmanic  
Hearing Scheduled: November 15, 1989

Dear Petitioner(s):

This is to advise you that \$773.89 is due for advertising and posting costs.

receipt  
Baltimore County  
Zoning Commissioner  
County Office Building  
111 West Chesapeake Avenue  
Towson, Maryland 21204

Account: R-001-6150  
Number: 71  
No. CR-89-459

DATE: 11-15-89  
PUBLIC HEARING FEES: 017 PRICE: \$473.89  
POSTING SIGNS / ADVERTISING: 000 TOTAL: \$473.89  
LAST DATE OF DUE: F & S LTD PART

8 133\*\*\*\*\*47389: 026LF  
Please make checks payable to: Baltimore County

CASE NO. CC-CG-884  
People's Counsel Inc.  
Southland Hills Impr. Assn., et al. v. F & S Ltd Partnership

RECEIVED FROM THE COUNTY BOARD OF APPEALS  
EXHIBITS, BOARD'S RECORD EXTRACT & TRANSCRIPT FILED IN THE ABOVE-ENTITLED CASE, AND ZONING COMMISSIONER'S FILE & EXHIBITS.

S. Smith  
Clerk's Office

Date: 4/17/90

**PETITION FOR ZONING RE-CLASSIFICATION**  
**SPECIAL EXCEPTION AND/OR VARIANCE**

TO THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition (1) that the zoning status of the herein described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an D.R. 5.5 zone to an Residential Office zone, for the reasons given in the attached statement; and (2) for a Special Exception, under the said Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property, for

and (3) for the reasons given in the attached statement, a variance from the following sections of the Zoning Law and Zoning Regulations of Baltimore County:

See "Exhibit A" for the reasons for the Petition outlined herein.

BALTIMORE COUNTY, MARYLAND  
OFFICE OF FINANCE-REVENUE DIVISION  
MISCELLANEOUS CASH RECEIPT

DATE 3/1/89 ACCOUNT 01-615-000 AMOUNT \$ 100.00

RECEIVED FROM: HARRY S. SHAPIRO

FOR: Reclass #307 W. Chesapeake Ave

VALIDATION OR SIGNATURE OF CASHIER  
DATE: 3/1/89 FIRM: AGENCY YELLOW: CUSTOMER

City and State: Towson, Maryland 21204

Attorney for Petitioner: HARRY S. SHAPIRO, ESQUIRE

City and State: Towson, Maryland 21204

Attorney's Telephone No.: (301) 825-0110

**NOTICE OF HEARING**

Petition for Zoning Reclassification  
Case Number: CR-89-459  
S/S W. Chesapeake Avenue, 95' E of c/l Florida Avenue  
Petitioner(s): F&S Limited Partnership

Petition to reclassify the property from an D.R.-5.5 to an R.O. zone.

TIME: 10:00 a.m.  
DATE: WEDNESDAY, NOVEMBER 15, 1989  
LOCATION: Room 301, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland 21204

WILLIAM T. HACKETT, CHAIRMAN  
County Board of Appeals

cc: Harry S. Shapiro, Esq.  
F&S Limited Partnership  
People's Counsel  
Board of Appeals

THIS IS TO ADVISE YOU THAT YOU WILL BE BILLED BY THE ZONING OFFICE FOR ADVERTISING AND POSTING COSTS WITH RESPECT TO THIS CASE APPROXIMATELY A WEEK BEFORE THE HEARING. THIS FEE MUST BE PAID AND THE SIGN AND NOT RETURNED TO THE ZONING OFFICE ON THE DAY OF THE HEARING OR THE ORDER WILL NOT BE ISSUED.

W.T.H.

Baltimore County  
Department of Public Works  
Bureau of Traffic Engineering  
County Office Building  
Towson, Maryland 21204  
(301) 887-3554

May 9, 1989

Mr. William Hackett  
Chairman, Board of Appeals  
County Office Building  
Towson, Maryland 21204

Zoning Reclassification Cycle 1  
Item No. 9

Property Owner: F & S Limited Partnership,  
Howard Frey G.P.  
R89-459; November 15, 1989  
No. 307 W. Chesapeake Avenue,  
E. of Florida Avenue  
D.R. - 5.5  
9th  
Councilmanic District:  
4th  
Acres: 0.16  
R.O.

Existing Zoning:  
Election District:  
Councilmanic District:  
Acres:  
Proposed Zoning:

Dear Mr. Hackett:

The existing D.R. - 5.5 zoning is expected to generate approximately 12 trips per day. The proposed R.O. zoning will generate approximately 55 trips per day.

This site appears to be too small to provide a driveway and entrance to meet county standards.

Very truly yours,  
Michael S. Flanigan  
Michael S. Flanigan  
Traffic Engineer Associate II

NSF/lvw

Form CAA

**CIRCUIT COURT FOR BALTIMORE COUNTY**

ASSIGNMENT OFFICE  
COUNTY COURTS BUILDING  
401 Bosley Avenue  
P.O. Box 6754  
Towson, Maryland 21285-6754

Kathy Rushton - 887-2660  
Jury Assignments-Civil  
General Settlement Conferences

Tina Campbell - 887-2661  
Non-Jury Assignments-Civil  
Special Settlement Conferences

TO: John C. Murphy, Esq.  
County Board of Appeals.

Arnold Jablon, Esq.

Harry S. Shapiro, Esq.

Phyllis Cole Friedman, Esq.

Peter Max Zimmerman, Esq.

RE: Non-Jury 90CC984 SOUTHLAND HILLS IMPROVEMENT ASSO. ET AL. VS. BOARD OF APPEALS OF BALTIMORE CO. AL.

HEARING DATE: THURSDAY, AUGUST 2, 1990 @ 9:30 A.M.

ON THE FOLLOWING: APPEAL: 2 hours

Please see the below notations.

UPON RECEIPT OF THIS NOTICE: Counsel shall contact each other immediately to conform calendar. Claim of not receiving notice will not constitute reason for postponement.

If the above Hearing Date is not agreeable to any counsel, a request for a postponement MUST BE MADE IN WRITING to the Assignment Office AS SOON AS POSSIBLE, with a copy to all counsel involved. POSTPONEMENTS PRIOR TO 20 DAYS OF TRIAL should be directed to the attention of Irene Summers. POSTPONEMENTS WITHIN 20 DAYS OF TRIAL must be made to the attention of the Director of Central Assignments-Joyce Grimm-887-3497.

SETTLEMENTS: If a settlement is reached prior to the hearing date, the Assignment Office must be notified immediately. All settlements must be put on the record if no order of satisfaction is filed prior to trial.



Baltimore County  
Fire Department  
Towson, Maryland 21204-2536  
494-4500

Paul H. Reische  
Chief

William Hackett  
Chairman, Board of Appeals  
Office of Planning and Zoning  
Baltimore County Office Building  
Towson, MD 21204

Dennis F. Rasmussen  
County Executive

Re: Property Owner: F&S Limited Partnership, Howard Frey G.P.

Location: S/S W. Chesapeake Ave., 95' E of centerline Florida Ave  
#307 W. Chesapeake Ave.  
Item No.: Nine (9) Zoning Agenda: 4/89-10/89

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below marked with an "X" are applicable and required to be corrected or incorporated into the final plans for the property.

( ) 1. Fire hydrants for the referenced property are required and shall be located at intervals of \_\_\_\_\_ feet along an approved road in accordance with Baltimore County Standards as published by the Department of Public Works.

( ) 2. A second means of vehicle access is required for the site.

( ) 3. The vehicle dead end condition shown at \_\_\_\_\_

EXCEEDS the maximum allowed by the Fire Department.

( ) 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operation.

(X) 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code," 1988 edition prior to occupancy.

( ) 6. Site plans are approved, as drawn.

( ) 7. The Fire Prevention Bureau has no comments at this time.

REVIEWER: *John Grason Turnbull, II* Noted and Approved: *John Grason Turnbull, II*  
Handling Group Fire Prevention Bureau  
Special Inspection Division

/31

**AUTHORIZATION TO SUE A. SCHENNING TO TESTIFY ON BEHALF  
OF THE SOUTHLAND HILLS IMPROVEMENT ASSOCIATION OF  
BALTIMORE COUNTY RELATIVE TO F&S APPLICATION  
BOARD OF APPEALS NO. 89-459; NO. 9, CYCLE 1**

1. Attached is a resolution adopted at the Association's annual meeting placing responsibility for review and action on zoning matters with the Board of Directors of the Association;

2. Sue A. Schenning is a duly elected member of the Board of Directors of the Association;

3. The Board of Directors has resolved to oppose the application of F&S to rezone the property known as 307 W. Chesapeake Avenue from D.R. 5.5 to R.O.

I hereby affirm that the matters and facts stated herein are true.

Attest: *Vince Nesline*  
Vince Nesline, Secretary

*Sue A. Schenning*  
Sue A. Schenning, President

**SOUTHLAND HILLS IMPROVEMENT ASSOCIATION  
OF BALTIMORE COUNTY, INC.**

TOWSON, MARYLAND 21204

Resolved: That at the Annual Meeting of the Southland Hills Improvement Association held on June 4, 1989, it was decided by the Association that responsibility for review and action on all zoning matters for the period June 4, 1989 through June 30, 1990 be placed in the Board of Directors consisting of the following members:

**Officers**

President:  
Vice President:  
Recording Secretary:  
Corresponding Secretary:  
Treasurer:  
Past President:

Sue Schenning  
David Cox  
Vince Nesline  
Toni Krometis  
Ginny Dorflier  
Tim Kolarik

**Directors**

Leigh Barrett  
Vince Nesline  
Andy Fran Bolton  
Ginny Dorflier  
Vivian Woodward  
Stephanie DiPaula  
Brad Waters  
Mindy Roche  
Martin Eby  
Toni Krometis  
Steve Perry  
Wilbert Boehm  
Eric Fondersmith  
Asa Grammes  
Charles Culbertson  
Robert Mueller  
Ray Turner

AS WITNESS OUR HANDS AND SEAL THIS FOURTH DAY OF JUNE, 1989.

ATTEST: The Southland Hills Improvement Association

*Vince Nesline*  
Secretary

*Sue A. Schenning*  
President

IN THE MATTER OF :  
F. & S. LIMITED PARTNERSHIP :  
RE: RECLASSIFICATION FROM :  
D.R. 5.5 TO R.O. ON PROPERTY :  
LOCATED ON THE SOUTH SIDE OF :  
WEST CHESAPEAKE AVENUE, 95 FT. :  
EAST OF THE CENTER LINE OF :  
FLORIDA AVENUE :  
9th DISTRICT :  
BALTIMORE COUNTY :  
No. R-86-340

**OPINION**

This case comes before this Board on a Petition to reclassify the subject site from DR 5.5 classification to R.O. classification. The property's address is 307 W. Chesapeake Avenue and contains some .16 acres. Case was heard this day in its entirety.

There is a long and unusual history to the property owners' attempts to acquire the necessary zoning to use this property as they wish. This history, by its very nature, is part of this Board's consideration of this petition. Consequently, we believe a condensed version of this history is necessary. Present owners purchased this parcel in the summer of 1979. At that time, there was pending on the site, a petition to reclassify the site from DR 5.5 to DR 16, with a Special Exception to allow office use. Such was, at that time, the appropriate zoning procedure. The Special Exception and Reclassification were granted, affirmed by the Board of Appeals and appealed to the Circuit Court, which affirmed the Board of Appeals. The building, at this time, was completely renovated at considerable cost and an occupancy permit obtained and office use begun. In the interim, however, a timely appeal of the Circuit Court's decision was taken. While said appeal was pending, the 1980 Comprehensive Map process was completed. Since the appeal was pending and since the office use had started, this site was not noted as an issue in the 1980 map process, and during said map process the property was once again classified DR 5.5. Thereafter the Court of Special Appeals reversed the

**The Circuit Court for Baltimore County**

JOHN GRASON TURNBULL, II  
JUDGE

COUNTY COURTS BUILDING  
TOWSON, MARYLAND 21204  
301-484-2847

IN THE MATTER OF :  
F & S LIMITED PARTNERSHIP :  
FOR :  
BALTIMORE COUNTY :  
CASE NO. 86 CG 2151

**ORDER**

WHEREAS, the Court of Special Appeals of Maryland reversed the Order of the Circuit Court for Baltimore County by its Opinion filed October 26, 1987;

IT IS THEREFORE, this 5th day of January, 1988,

ORDERED, by the Circuit Court for Baltimore County, that the Order of the Board of Appeals of Baltimore County, dated May 16, 1988, be and the same is hereby REVERSED.

*John Grason Turnbull, II*  
JOHN GRASON TURNBULL, II  
JUDGE

Copies sent to: Peter Max Zimmerman, Esquire  
Phyllis Cole Friedman, Esquire  
Harry S. Shapiro, Esquire  
John C. Murphy, Esquire

FILED JAN - 6 1988

**The Circuit Court for Baltimore County**

JOHN GRASON TURNBULL, II  
JUDGE

COUNTY COURTS BUILDING  
TOWSON, MARYLAND 21204  
301-484-2847

IN THE MATTER OF :  
F & S LIMITED PARTNERSHIP :  
CASE NO. 86 CG 2151

**OPINION AND ORDER**

The Court has reviewed the file, read the transcript, heard argument of counsel, and is prepared to rule on the appeal filed by the Appellants, Southland Hills Improvement Association of Baltimore County, Inc., Eugene L. Kibbe, Jr., and Phillip M. Kenney, and on an appeal filed by People's Counsel for Baltimore County.

On May 6, 1986, the County Board of Appeals, hereinafter referred to as "Board," granted a petition for reclassification for a property known as 307 W. Chesapeake Avenue from "D.R. 5.5 to R.O.," saving and excepting a five-foot buffer that remained D.R. 5.5.

It is eminently clear that this Court's scope of review is a question of whether or not the action by the Board is arbitrary and discriminatory or is it fairly debatable.

There is no doubt that the Board granted the re-zoning pursuant to authority properly conferred upon it. The Court, as set forth in *Boyce v. Sembly*, 25 Md. App. at 43, must find strong evidence of error to make the issue of mistake in comprehensive zoning fairly debatable, and if there is no such strong evidence, then the Board's action is arbitrary and capricious.

The testimony in support of the error came from a Mr. Howard L. Frey and a Mr. Paul Cooper, a real estate appraiser. There were exhibits presented of changes, such as photographs and, along with the testimony, were cited as evidence of error and change. The Board in its opinion after considering all of the evidence, including the physical aspect of the property, found that the D.R. 5.5 classification was error.

FILED JAN 12 1987

County Board of Appeals of Baltimore County  
ROOM 315, COUNTY OFFICE BUILDING  
TOWSON, MARYLAND 21204

Census '90

Southland Hills Improvement Assoc., et al  
408 Dixie Drive  
Towson, MD 21204

County Board of Appeals of Baltimore County  
ROOM 315, COUNTY OFFICE BUILDING  
TOWSON, MARYLAND 21204

Census '90

Southland Hills Improvement Assoc., et al  
408 Dixie Drive  
Towson, MD 21204

F & S LIMITED PARTNERSHIP

S/S W. Chesapeake Avenue, 95' E of C/L  
Florida Ave. (307 W. Chesapeake Ave.)

D.R. 5.5 to R.O.

#R-89-459

Item #9  
Cycle 1 - 1989

9th Election District  
4th Councilmanic District

0.16 acres

March 1, 1989

Petition filed.

Harry S. Shapiro, Esquire  
400 W. Pennsylvania Ave.  
Towson, Maryland 21204  
825-0110

Counsel for Petitioner ✓

F & S Limited Partnership  
c/o Howard L. Frey, General Partner  
307 W. Chesapeake Avenue  
Towson, Maryland 21204

Petitioner

James Earl Kraft  
Baltimore County Board of Education  
940 York Road, Towson, MD 21204

People's Counsel ✓

Phyllis Cole Friedman

P. David Fields  
Pat Keller  
J. Robert Haines  
Ann M. Nastarowicz  
James E. Dyer  
Docket Clerk - Zoning  
Arnold Jablon, County Attorney

*John Murphy* - Southland Hills Comm. Assoc.  
*Sue Schenning*  
308 Dixie Drive  
Towson, MD 21204



constituents. This evidence was uncontested before the Board of Appeals, and was never touched upon by the Circuit Court, or in this Honorable Court's Opinion. On page 12 of the Appellant's Brief, facts relating to the plebiscite were established without contradiction and cases were cited, including Mayor and Council of Rockville v. Cotler, 230 Md. 335, 187 A.2d 94, which clearly stated that a zoning decision based upon the plebiscite of neighbors is not permissible. We believe that this issue should have been treated by the Circuit Court which would have provided this Honorable Court with a serious and important issue for its consideration.

7. Another issue which was not discussed by the Circuit Court, although submitted to the Circuit Court for consideration, was the issue of the "floating zone" discussed on Page 18 of the Appellant's Brief. The theory in the case law cited on said page and following was that Rules applicable to a statute creating a "floating zone" were not subject to the same rules as under other zoning reclassifications. The case of Knudsen v. Montgomery County Council, 241 Md. 436, 217 A.2d 97, stated that the "mistake change" rule does not apply in considering reclassification of land applicable to a floating zone. In the case at bar, the underlying zoning remains the same, but the "residential-office zone" is merely a floating zone which gives the property owner the right to limited office use in a residential zone. Therefore, if the theory of the "floating zone" is applicable in the case at bar, the presumptions

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applicable to County Council legislation do not apply in the case of the zoning considerations in this case. This serious issue was never discussed by the Circuit Court (although presented), and was not touched upon in this Court's Opinion.

We can appreciate that this Court was directed by the Appellee to the zoning history involving the subject property. However, as this Court pointed out in its Opinion, every Land Use Map is a separate case with new facts and circumstances surrounding the demands, and requirements for comprehensive zoning every four years.

8. We attempted in this Motion to give this Honorable Court an overview of the serious issues which we believe were not treated in this case. If the Circuit Court would have discussed these issues in its Opinion, we believe that this Honorable Court would have had a better record to review. In the absence of that Record, we believe that the Appellant was prejudiced in the consideration of these issues before this Honorable Court. However, the Maryland Rules provide an appropriate procedure in order to accomplish justice in a case such as exists here where the Circuit Court on the Appeal, failed to exhaust relevant issues in the case. Under Maryland Rule 8-604, this Honorable Court has various alternatives for a disposition. Under Section (a)(5), this Honorable Court can remand the action to a lower Court in order to have various issues reviewed which were not reviewed, or discussed, by the Circuit Court. This would accomplish substantial justice in that the Circuit Court could then amplify its review on the relevant issues

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discussed herein, and then could provide this Honorable Court with a better record in the event an Appeal were taken to this Honorable Court once again. This procedure would be fair to everyone concerned because it would give the opportunity for truth to be explored on the issues raised herein. If the Appellant is wrong on these issues, and a legal foundation is provided by the Circuit Court based upon a study of the Record before the Board of Appeals, then justice would have been done.

HARRY S. SHAPIRO  
400 W. Pennsylvania Avenue  
Towson, Maryland 21204  
(301) 825-0110  
Attorney for Appellant

#### POINTS AND AUTHORITIES

Article 66B, Section 4.08 of the Annotated Code of Maryland (1988 Replacement Volume)

Ginn v. Farley, 43 Md.App. 219, 403 A.2d 858

Southland Hills Improvement Association v. Raine, 220 Md. 213, 151 A.2d 734

Mayor and Council of Rockville v. Cotler, 230 Md. 335, 187 A.2d 94

Knudsen v. Montgomery County Council, 241 Md. 436, 217 A.2d 97

Section 230 of the Zoning Regulations for Baltimore Co.

Maryland Rule 8-604

Maryland Rule 8-605

9

I HEREBY CERTIFY that on this 3 day of September, 1991 a copy of the foregoing Motion for Reconsideration was mailed to Peter Max Zimmerman, Esquire, Deputy People's Counsel, County Office Building, Towson, Maryland 21204, and John C. Murphy, Esquire, 516 N. Charles Street, Baltimore, Maryland 21201.

Attorney for Appellant

10

5/3/91 - Court of Special Appeals AFFIRMED Circuit Court  
which REVERSED C.B. of A.  
#R-89-459 (F & S Ltd. Part.)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1619

September Term, 1993

F & S LIMITED PARTNERSHIP /

v.

PEOPLE'S COUNSEL FOR BALTIMORE  
COUNTY, et al.

Moylan,  
Wenner,  
Motz,

JJ.

PER CURIAM

Filed: August 5, 1991

The appellant, F & S Limited Partnership (F & S), is nothing if not persistent. For the fourth time, it causes to be brought before us essentially the same question. For the fourth time, we return essentially the same answer. The current appeal stems from an order by Judge Joseph F. Murphy Jr., in the Circuit Court for Baltimore County, reversing the decision of the Baltimore County Board of Appeals (Board) to rezone appellant's property from Density Residential 5.5 (D.R. 5.5) to Residential Office (R.O.). F & S contends that the lower court erred:

1. When it reversed the Board of Appeals decision to grant the rezoning application; and
2. When it failed to dismiss all of the appellees when it dismissed Southland Hills Improvement Association of Baltimore County, Inc. (Southland Hills) for lack of standing.

F & S purchased 307 West Chesapeake Avenue in the summer of 1979. The property, which comprises .16 acre, lies in the block between Florida Avenue on the west and Bosley Avenue, one of the widest and most heavily travelled roads in the Towson area, on the east. Located in the Southland Hills neighborhood, it is situated immediately west of the line marking the division between D.R. 5.5 and R.O. zoning. Across West Chesapeake Avenue, to the north, is a church which is also in the D.R. 5.5 zone. The church leases its parking lot as commercial parking during the week. To the east, directly across the zoning line, at 305 West Chesapeake Avenue (the Chesapeake Building), is a five-story office building, and other dwellings converted to offices. To

the west and south is residential housing, with the exception of the nearest house to the west at 309 West Chesapeake Avenue. That house is occupied by an attorney and his wife; a special exception has been granted permitting an office therein so long as the residential use continues.

In 1976, the Baltimore County Council, as part of its quadrennial comprehensive zoning, placed 307 West Chesapeake Avenue in its present classification, D.R. 5.5. Shortly after acquiring the property in 1979, F & S filed a petition for a zoning reclassification with the Baltimore County Board of Appeals. On April 24, 1980, the Board of Appeals granted F & S its requested reclassification, ruling that the County Council was in error in its 1976 zoning determination with respect to the property. The People's Counsel for Baltimore County appealed to the circuit court, which affirmed the ruling of the Board of Appeals. People's Counsel then filed an appeal with this Court.

In an unpublished opinion in the case of People's Counsel for Baltimore County v. Howard L. Frey, et al. (No. 1352, Sept. Term, 1990, filed May 4, 1981), we overruled the circuit court and held that the Board of Appeals had been arbitrary and capricious in its determination that the County Council's 1976 zoning determination had been in error. The issue on that appeal was whether the Board of Appeals had any adequate basis for concluding that the County Council's comprehensive zoning map of 1976 had made a "mistake" when it placed the D.R. 5.5 zoning classification on 307 W. Chesapeake Avenue, just as the primary issue on this appeal is whether the Board of Appeals had any

adequate basis for concluding that the County Council's comprehensive rezoning map of 1988 had made a "mistake" when it reaffirmed its placing of the zoning classification D.R. 5.5 on 307 W. Chesapeake Avenue (just as it had, in the interim, repeated that zoning reclassification in the comprehensive rezoning maps of 1980 and 1984).

In terms of the controlling law, we repeat here what we said there. Our inquiry is limited to whether the action taken by the Board was "arbitrary and discriminatory or fairly debatable." Trainer v. Lipchin, 269 Md. 667, 672 (1973). That inquiry, however, is subject to the equally basic maxim that the task presented to one who seeks to overcome the strong presumption of the correctness of original zoning or comprehensive rezoning "is manifestly a difficult one." Stratakis v. Beauchamp, 268 Md. 643, 653 (1973).

Royce v. Sembly, 25 Md.App. 43, 51-52 (1975), spelled out the criteria for determining when an actual zoning "mistake" has been made by the appropriate legislative authority:

"It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council.... Because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore, could not have been considered, there is no necessity to present

RECEIVED  
COUNTY BOARD OF APPEALS  
31 AUG -6 PM 1:44



evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning. Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to the comprehensive zoning is not overcome and the question of error is not fairly debatable. "... (citations and footnote omitted).

See also Howard County v. Dorsey, 45 Md.App. 692, 703-704 (1980).

The primary fact relied upon by the Board of Appeals in finding a mistake on that earlier occasion was "the precise location of the subject lot immediately next to and literally in the shadow of the five-story Chesapeake Building." We pointed out in our opinion that this fact of the existence of the Chesapeake Building, in the specific context of a plea for less restrictive zoning by F & S's predecessor in title, "was before the County Council in 1976, in the context of the comprehensive rezoning; it was considered and rejected." In holding that the Board of Appeals had been arbitrary and capricious, we concluded:

"That the Board disagreed with the Council's conclusion and believed that a buffer zone would be more appropriate does not mean that the Council made a 'mistake,' as that term is traditionally defined."

Although one might assume that our 1981 decision would have been dispositive of the matter, F & S was given room to wriggle when the County Council's comprehensive rezoning of 1980 reaffirmed the earlier zoning classification of 1976. F & S again petitioned the Board of Appeals for a zoning reclassification, now claiming that the County Council's 1980

decision had been a mistake. The Board of Appeals on that second occasion denied F & S's petition and the Circuit Court for Baltimore County affirmed that decision. Following the appeal by F & S, we issued an unpublished opinion on February 10, 1984, entitled F & S Limited Partnership v. People's Counsel for Baltimore County, et al., (No. 676, September Term, 1983), affirming the decision of the circuit court in affirming the Board of Appeals. On that occasion, F & S based its case both upon its proximity to the Chesapeake Building and upon the use of the church parking lot across the street for commercial parking during the working day. In that opinion, we pointed out that both of those factors had been before the County Council when it made its 1980 rezoning determination:

"In this case, the subject property and the surrounding areas were considered in the 1980 map process. It was within the Council's discretion to decide that the line of demarcation should remain the same as it was in 1976, with the substitution of R-O for D.R. 16 zoning. Dahl v. County Board of Appeals of Baltimore County, 258 Md. 157, 265 A.2d 227 (1970). The County Council classified the subject property as D.R. 5.5 in 1976 and reaffirmed that classification in 1980. The determination is presumed correct unless F & S proved the Council failed to take into account existing facts. Boyce v. Sembly, supra. F & S attempted to produce testimony to indicate the Council was mistaken in the use of the church property, and that the Council erred in establishing the line between D.R. 5.5 zoning and R-O zoning at the Chesapeake Building."

F & S, still unbowed, waited for the County Council to issue the 1984 comprehensive rezoning map. When the Council, with the particular issue of F & S's classification having been explicitly raised before it, nonetheless reaffirmed the D.R. 5.5 zoning

classification, F & S once again applied to the Board of Appeals for reclassification, this time claiming a mistake by the County Council in its 1984 determination. On May 6, 1986, the Board of Appeals ruled in F & S's favor, finding that the 1984 D.R. 5.5 classification had, indeed, been in error. On January 12, 1987, the circuit court affirmed that decision by the Board of Appeals. People's Counsel for Baltimore County appealed to us. On October 26, 1987, we rendered our third unpublished decision in this case, People's Counsel of Baltimore County, et al. v. F & S Limited Partnership, (No. 216, September Term, 1987). Just as we had in 1981, we reversed the circuit court and held that the action of the Board of Appeals had been arbitrary and capricious. We initially pointed out the repetitive nature of the claim:

"This case raises a question almost identical to that raised in People's Counsel for Baltimore County v. Boyce & L. Fry, Court of Special Appeals, September Term, 1980, No. 1352, filed May 4, 1981, one of the previous disputes between these same parties. In that case, we were asked to determine whether a 'mistake' was made in the comprehensive rezoning of Baltimore County in 1976. The only difference between that case and this one is the year in which the case arose. The same question remains: Was a mistake made in the comprehensive rezoning of Baltimore County which would form a basis for the Board of Appeals to reclassify this property?"

We stated on that occasion, as we shall repeat today, that the Board of Appeals simply had a difference of opinion with the County Council as to what the appropriate zoning classification should have been. The Board of Appeals stubbornly failed to give appropriate deference to the County Council as the governmental body authorized to make the determination. It presumed rather to

substitute its judgment for that of the Council. In pointing out that the Board of Appeals' difference of opinion with the County Council did not ipso facto render the County Council's decision erroneous, we observed:

"Noticeably absent from the Board's opinion is any explanation of how these two factors combine to meet the 'error' standard as set out in Boyce...."

.... Certainly the physical aspects of the site were taken into account by the Council when it zoned the site D.R. 5.5 in 1984 and presumably the Council was also aware of Sections 203.1 and 203.2, since they had been passed just four years earlier. Furthermore, neither the opinion nor the testimony of the witnesses who spoke in favor of the rezoning indicates that there were any subsequently occurring events which the Council could not have taken into account when it zoned the property D.R. 5.5. The record is devoid of any evidence of 'error.'"

For what we thought was the final time, we concluded:

"It is clear from the record in this case, and from the language of the Board's opinion, that the 'mistake/error' test set forth in Boyce was neither met nor properly applied, and as such, the decision of the Board of Appeals was arbitrary and capricious. Accordingly, we reverse the order of the circuit court which affirmed that decision and direct that the circuit court reverse the order of the Board of Appeals in which the rezoning was granted."

Our optimism was short-lived. The comprehensive rezoning of 1988, steadfastly and consistently reaffirming the D.R. 5.5 classification, provided F & S with yet a fresh occasion for claiming mistake or error on the part of the County Council. In granting the requested reclassification, the Board of Appeals,

apparently now exhibiting a stubbornness of its own, agreed that the County Council had been guilty of a mistake.

Because each comprehensive rezoning by the County Council on its quadrennial basis affords the opportunity to make a fresh claim that some aspect of that rezoning was a mistake, each petition to the Board of Appeals for reclassification based upon such alleged mistake is literally a new case. We are thus denied the luxury and the efficiency of disposing of each new claim by resort either to res judicata or to "the law of the case" doctrine. It may well be, however, that collateral estoppel could efficaciously serve this purpose, but on this occasion we choose to reach the same result by looking to the merits, as did Judge Murphy.

On the appeal of the reclassification by the Board of Appeals to the circuit court, Judge Murphy, while sympathizing with what the Board of Appeals wanted to do on the merits, pointed out succinctly how the limitations cabinining its scope of review do not permit it that prerogative:

"Although the present zoning is indeed 'inappropriate,' this Court must reverse because the Board's decision is based upon an incorrect interpretation of law. In zoning law, 'error' means 'misapprehension' rather than 'bad judgment.' There was no misapprehension in this case."

Openly sympathetic toward what the Board of Appeals wanted to do on the merits, Judge Murphy nonetheless admonished the Board that a decision on the zoning merits was not one of its options:

"[T]he Board's decision makes much more sense than the Council's decision. The narrow issue before this Court, however, is whether the factual 'error' found by the Board

constitutes legal 'error' as that term is defined in zoning law. As long as all the material facts were known to the Council, the Board cannot reverse on the basis of 'error.' Legal 'error' requires 'evidence [that]...the Council's action was premised on a misapprehension.' Coppolino v. County Board of Appeals of Baltimore, 23 Md.App. 358, 372, 328 A.2d 55, 63 (1974). No reasonable person could conclude that there was any misapprehension in this case."

As we review the findings and rulings of Judge Murphy, it is appropriate to state the standard of review to be applied by all reviewing authorities in determining whether the basic zoning decision by the County Council is in error. There is a strong presumption that the County Council was correct when it comprehensively rezoned the County in 1988. Howard County v. Dorsey, 292 Md. 351, 355 (1982); Boy v. Boyd, 42 Md. App. 527, 533 (1979). F & S, desiring to rezone only its property, thus had the heavy burden of proving to the Board the basis for a piecemeal change, which requires "strong evidence" of error. Howard County v. Dorsey, 292 Md. at 355; Pattey v. Board of Co. Comm'rs, 271 Md. 352, 359 (1974). The burden is only met when probative evidence shows that the Council relied upon invalid assumptions or premises at the time of the comprehensive rezoning.

The County Council, moreover, is presumed to have had before it and to have considered all of "the relevant facts and circumstances then existing." Boyce v. Sembly, 25 Md. App. 43, 51 (1975). F & S had the burden of showing those facts existing at the time of the comprehensive rezoning, and also "which, if

any, of those facts were not considered by the Council." (emphasis supplied). 25 Md. App. at 51.

The Board of Appeals based its finding of error on the ostensible failure of the County Council to consider three factors. Far and away the most prominent of these was the fact that immediately adjacent to 307 West Chesapeake Avenue was the Chesapeake Building -- "an enormous five-story office building with an enormous commercial parking lot." The hard reality was that the Chesapeake Building had been immediately adjacent to 307 West Chesapeake Avenue since its erection in 1964. It was a stark and inescapable fact that was brought to the attention of the County Council regularly as it approached its quadrennial comprehensive rezoning, that was the basis of F & S's petition for reclassification to the Board of Appeals on all three previous occasions, and that was a prominent factor mentioned by this Court in all three of its previous opinions.

The Board of Appeals also attached significance to the fact that commercial parking was permitted on weekdays on the parking lot of the church located immediately across the street from 307 West Chesapeake Avenue. Once again, that was a prominent factor that had been explicitly before the County Council, the Board of Appeals, and this Court on several occasions prior to the comprehensive rezoning of 1988.

With respect to both of these factors, Judge Murphy found:

"The office building at 305 West Chesapeake Ave. does not satisfy the Coppolino test. The Council was fully aware of its existence and its proximity to the subject property. The Council had also been apprised of the fact that Towson area workers

rent spaces on the church parking lot. The particular uses being made of these properties were brought to the Council's attention during the 1988 Comprehensive Map process, but the Council nonetheless refused to change the '5.5' zoning on 307 W. Chesapeake Ave. Such a considered decision cannot constitute an 'error' under the zoning laws."

Quite aside from the fact that the church parking lot was not overlooked when the County Council undertook its comprehensive rezoning in 1988, its use to accommodate Towson office workers on weekdays cuts against the grain of F & S's argument. Its use as a parking lot was pursuant to a special exception granted by the Board of Appeals. For a special exception to be granted, there must be a finding that it "conform[s] to the plan and is compatible with the neighborhood." Md. Code Ann. Art. 66B, § 1.00 (1957, 1988 Repl. Vol.). See also Creswell v. Baltimore Aviation, 257 Md. 712, 719 (1970). Thus, the use of the church parking lot had been found to be compatible with the D.R. 5.5 zone and did not, therefore, give any indication that 307 West Chesapeake Avenue was an island of D.R. 5.5 zoning surrounded by a sea of different and incompatible uses.

This same analysis applies to the third and final factor relied upon by the Board of Appeals--the use of 309 West Chesapeake Avenue, adjacent to the subject property to its immediate west, as a law office so long as the law firm also remains in residence there. Once again, this was pursuant to a special exception, the granting of which is contingent upon a finding that the exception is compatible with the neighborhood.



This law office-residence combination, along with the church parking lot, confirms that 307 West Chesapeake Avenue is solidly ensconced in a compatibly surrounding D.R. 5.5 environment. In this regard, Judge Murphy found:

"The special exception for 309 West Chesapeake Avenue was not granted until after the 1988 map process had been completed. Such a special exception, however, does not prove either error or substantial change in the character of the neighborhood. A law office is permitted on 309 W. Chesapeake only if the lawyer who occupies it also uses the property as his or her principal residence, and this special exception required a finding that such use is compatible with those uses permitted as of right in the [D.R. 5.5] zone."

Judge Murphy concluded:

"There can be no dispute, however, about whether the Council's decision was or was not based upon a 'misapprehension.' Because the Council knew all the material facts, its refusal to rezone the subject property was not 'in error,' and the Board's rezoning of 307 West Chesapeake Avenue must therefore be reversed."

We affirm his decision. There was no legally sufficient evidence from which the Board of Appeals could possibly have found that the 1988 rezoning by the County Council was a "mistake," as that term of art is used in zoning law. The ruling of the Board of Appeals was, therefore, arbitrary and capricious and was properly reversed by the circuit court.

F & S's second and final contention will not detain us long. When the current case first came before the circuit court, F & S filed a Motion to Dismiss as to all of the appellants at that stage because of their ostensible lack of standing. Answers were filed and argument was heard before Judge Alfred T. Brennan on

June 12, 1990. Judge Brennan dismissed the Southland Hill's Improvement Association as a party but ruled that all others were legitimately in the case.

F & S's difficulty is that no transcript was made of the hearing before Judge Brennan and nothing with respect to that hearing is in the record extract presented to us. Judge Brennan rendered his decision in an oral ruling from the bench which also has not been transcribed and included as part of the record extract in this case. We, therefore, have no way of knowing whether Judge Brennan was correct or not. We are being called upon, in effect, to declare the winner of a nothing-to-nothing tie. That is not a difficult assignment for the law permits no ties. It avoids the tie by allocating the burden of proof.

Upon appellate review of the action of a trial court, we begin with the presumption that such action was correct and proper. The burden is upon the party alleging error to persuade us that error occurred. When, among other failures of proof, we have no way of knowing what happened or why it happened, the presumption of correctness is self-evidently un rebutted. Under such circumstances, we have no alternative but to affirm.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

CIRCUIT COURT FOR BALTIMORE COUNTY  
CIVIL GENERAL

DOCKET 78 PAGE 184 CASE NO. 90CG984 CATEGORY Appeal

SOUTHLAND HILLS IMPROVEMENT ASSOCIATION  
OF BALTIMORE COUNTY, INC.  
CHARLES CLIBERTSON  
ROBERT LINDSAY  
BERT BOHM  
MARTIN EBY  
MATT NOLA

Appellants'

BOARD OF APPEALS OF  
BALTIMORE COUNTY

Appellee  
IN THE MATTER OF THE APPLICATION OF  
F & S LIMITED PARTNERSHIP

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

ATTORNEYS

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687-2168

(1) March 15, 1990 - Appellants' Order for Appeal from the Decision/Order (Administrative agency) & Petition for Appeal fd.

(2) March 16, 1990 - Certificate of Notice fd.

(3) Mar. 21, 1990 People's Counsel for Balto. Co. Notice of Appeal from the Order of the Co. Bd. of Appeals and Petition for Appeal fd.

(4) Mar. 21, 1990 - Certificate of Notice, fd.

(5) April 5, 1990 - Rpt. of HARRY S. SHAPIRO For F & S LIMITED PARTNERSHIP and same day motion to Dismiss Appeal of PEOPLE'S COUNSEL FOR BALTO. CO. AND Request for Hearing, fd.

(6) Apr 6, 1990 - PEOPLE'S COUNSEL FOR BALTIMORE COUNTY Answer to Motion to Dismiss Appeal of People's Counsel for Baltimore County fd.

(7) April 10, 1990 - Appellee's Motion to dismiss Appeal of appellants AND Request for Hearing, fd.

(8) April 12, 1990 - Transcript of Record, fd.

(9) April 12, 1990 - Notice of filing of Record, fd.

(10) May 11, 1990 - Appellants' Answer to Motion to Dismiss, Memorandum, fd.

(11) May 11, 1990 - PEOPLE'S COUNSEL FOR BALTO. COUNTY, Memorandum, fd.

(12) June 8, 1990 - Appellee's F&S LIMITED PARTNERSHIP Memorandum in Support of Motion to Dismiss Appeals fd.

(OVER)

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90CG984

CASE NO. 90CG984

June 12, 1990 Hon. Alfred L. Brennan. Hearing had. Appellee's Motion to dismiss appeal of People's Counsel for Baltimore Co. (Paper#7) - DENIED. Appellee's (F&S Limited Partnership) Motion to dismiss Appellants (Paper#7) - GRANTED as to Appellant, Southland Hills Improvement Assoc. of Baltimore County, Inc., and DENIED as to remaining Appellants

(13) July 16, 1990 - Appellee's F & S LIMITED PARTNERSHIP, Answer to Petitions of Appeal Exhibits and Request for Hearing, fd.

Aug. 2, 1990 Hon. Joseph F. Murphy, Jr. Hearing had. Opinion to be filed.

4) Sept. 26, 1990 - Memorandum Opinion and Order of Court that the Feb 14, 1990 Order of the Board of Appeals in Case No. 89-459 (Item 9, Cycle I) be and the same is hereby REVERSED. (JFM, Jr)

(15) Oct 15, 1990 - F & S LIMITED PARTNERSHIP, Notice of Appeal to the Court of Special Appeals fd. (5/101)

1 Oct 16, 1990 Order to Proceed (RLJ) fd.

Oct. 29, 1990 Hon. Joseph F. Murphy, Jr. Hearing had. Employer/Insurer motion for summary judgment (p.#6) Denied. Claimant's motion for summary judgment (p.#7) Denied.

F-89-459 F & S Ltd. Part.  
9/24/90 - Board of Appeals  
REVERSED (Murphy)

SOUTHLAND HILLS  
VS.  
BOARD OF APPEALS

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE COUNTY  
\* CASE NO. 90 CG 984

MEMORANDUM OPINION

On February 14, 1990, the Board of Appeals ordered that 307 West Chesapeake Avenue (the "subject property") be rezoned from "D.R. 5.5" to "R.O.". This Order was based upon the Board's factual finding that the subject property "no longer contains any value as a pure residence and to deny the owners a reasonable use of the property compatible with surrounding properties with commercial uses is inappropriate and in error." (Board Opinion, page 5). Although the present zoning is indeed "inappropriate," this Court must reverse because the Board's decision is based upon an incorrect interpretation of law. In Zoning law, "error" means "misapprehension" rather than bad judgment. There was no misapprehension in this case.

The subject property is located about three blocks from the center of Towson and is less than a block from Bosley Ave., one of the widest and most heavily travelled roads in the Towson area. It is on the south side of Chesapeake Ave., sandwiched between a

huge office building and a single family dwelling in which a law office is permitted by special exception. Directly across the street from the subject property is a church parking lot on which area employees rent spaces during working hours. There is "5.5" zoning on Chesapeake Ave. from Bosley Ave. to the eastern boundary of the subject property. The Council decided that the office building at 305 West Chesapeake Ave. should form the western edge of the "5.5" zone. "R.O." zoning extends in a westerly direction from the boundary line between 305 West Chesapeake Ave. and the subject property.

Under these circumstances, the Board's decision makes much more sense than the Council's decision. The narrow issue before this Court, however, is whether the factual "error" found by the Board constitutes legal "error" as that term is defined in Zoning law. As long as all the material facts were known to the Council, the Board cannot reverse on the basis of "error." Legal "error" requires "evidence (that)...the Council's action was premised on a misapprehension. "Copolino v. County Board of Appeals of Baltimore County, 23 Md App. 358, 372, 328 A.2d 55, 63 (1974). No reasonable person could conclude that there was any misapprehension in this case.

The office building at 305 West Chesapeake Ave. does not satisfy the Copolino test. The Council was fully aware of its existence and its proximity to the subject property. The Counsel had also been apprised of the fact that Towson area workers rent spaces on the church parking lot. The particular uses being made of these properties were brought to the Council's attention during the 1988

Comprehensive Map process, but the Council nonetheless refused to change the "5.5" zoning on 307 W. Chesapeake Ave. Such a considered decision cannot constitute an "error" under the Zoning laws.

The special exception for 309 West Chesapeake Avenue was not granted until after the 1988 map process had been completed. Such a special exception, however, does not prove either error or substantial change in the character of the neighborhood. A law office is permitted on 309 W. Chesapeake only if the lawyer who occupies it also uses the property as his or her principal residence, and this special exception required a finding that such use is compatible with those uses permitted as of right in the R.O. zone. Creswell v. Baltimore Aviation, 257 Md. 712, 719, 264 A.2d 638, 842 (1970).

The Board's decision in this case was not based upon a conclusion that the Council's decision had been "arbitrary and capricious." It is obviously very difficult to prove that a zoning decision is arbitrary and capricious rather than "fairly debatable." Anne Arundel County v. A-Pac, Ltd., 67 Md. App. 122, 126-127, 506 A.2d 671, 673 (1986). It is impossible, however, to prove legal "error" when all the material facts have been brought to the Council's attention.

This Court agrees with the Board that the Council's refusal to rezone the subject property was, to say the least, "inappropriate." This Court is also persuaded that the Board's decision is far more reasonable than the decision made by the Council. This Court applauds the Board's valiant effort to achieve a practical solution to a bitterly contested neighborhood dispute. There can be no

dispute, however, about whether the Council's decision was or was not based upon a "misapprehension." Because the Council knew all the material facts, its refusal to rezone the subject property was not "in error," and the Board's rezoning of 307 West Chesapeake Avenue must therefore be reversed.

ORDER

For the reasons set forth in the above Memorandum Opinion, IT IS THIS 20th DAY OF SEPTEMBER, 1990 BY THE CIRCUIT COURT FOR BALTIMORE COUNTY

ORDERED that the February 14, 1990 Order of the Board of Appeals in Case No. R-89-459 (Item 9, Cycle I) be and the same is hereby REVERSED.

Joseph F. Murphy, Jr.  
JUDGE

THOMAS G. TULL  
SUSANNE M. HENSH, CLERK  
Per [Signature]  
Deputy Clerk

FILED SEP 24 '90



6-8-90

F&S LIMITED PARTNERSHIP. • BEFORE THE BALTIMORE  
Petition for Zoning • COUNTY BOARD OF APPEALS  
Reclassification • Case No. CR-89-459

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR PROTECTIVE ORDER  
AND/OR TO QUASH SUBPOENA DUCES TECUM

1. THE EVIDENTIARY ASPECT OF THE IMMUNITY DOCTRINE AFFORDS A COUNTY COUNCILMAN A PRIVILEGE TO REFUSE TO ANSWER ANY FORM OF DISCOVERY IN A CIVIL CASE, INCLUDING A REQUEST FOR A SUBPOENA, THE PRODUCTION OF DOCUMENTS, OR OTHERWISE.

Charter Section 304 makes it clear that the Council has all legislative powers which it is possible for the Charter to confer on the County's lawmaking body, and Charter Section 3 establishes that all actions by the Council are subject to the Constitution and the State's public general laws.

Charter Section 306 provides, in effect, that the County Council is the elected legislative body of the County, vested with all the law-making power, including such powers as may previously have been exercised by the General Assembly of Maryland and which were transferred to the County on Charter adoption. Thus, the County Council is empowered to enact local law for the County and to repeal or amend public local law previously enacted by the General Assembly upon matters covered by the Express Powers Act. A concomitant of the power to enact law

previously reposing in the General Assembly, and now transferred to the County Council, is the privilege of speech and debate relevant to legislative proceedings. The Maryland Declaration of Rights states, "That freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature." DR Article 10, "Freedom of speech and debate and proceedings in legislature."

State Constitution Article III, Section 18, reiterates the protection afforded by DR Article 10 against inquiry into the communicative processes of the legislative branch: "No Senator or Delegate shall be liable in any civil action or criminal prosecution, whatever, for words spoken in debate." The purpose of this privilege is to afford protection to the integrity of the legislative process by insuring the independence of individual legislators and reinforcing the separation of powers embodied in a tripartite form of government; moreover, it is designed to prevent intimidation by the executive and accountability before a possibly hostile judiciary. Blondes v. State, 16 Md. App. 165, 294 A.2d 661 (1972). Further, the legislative privilege should be construed in pari materia with Article 1, Section 6 of the federal Constitution. Blondes v. State, supra.

Elaborating on the legislative privilege, Corwin, for the Congressional Legislative Reference Service, Library of Congress, in The Constitution of the United States - Analysis and Interpretation, states:

"The protection of this clause is not limited to words spoken in debate, but is applicable to written reports, to resolutions offered, to the act of voting and to all things generally done in a session of the House by one of its members in relation to the business before it. In Kilbourn v. Thompson, the Supreme Court quoted with approval the following excerpt from the opinion of Chief Justice Parsons in the Early Massachusetts

of Coffin v. Coffin, giving a broad scope to the immunity of legislators: 'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office.' (Emphasis supplied.) P. 99 (1952 Ed.) citing, inter alia, Kilbourn v. Thompson, 103 U.S. 168 (1881), and Coffin v. Coffin, 4 Mass. 01 (1808).

Stated otherwise, the privilege protects against inquiry into acts which occur in the regular course of the legislative process and into the motivation for those acts. Blondes v. State, supra. Admittedly, a legislator may do something in the course of his legislative tenure which does not render the act a legislative one; however, where, as here, the act relates to the due functioning of the legislative process, the privilege will apply. United States v. Mandel, 415 F. Supp. 1025 (D. Md., 1976), aff'd 602 F.2d 653 (4th Cir.), rehearing en banc denied, 609 F.2d 1076 (4th Cir. 1979). Obviously, the "due functioning of the legislative process" would include the making, keeping or maintaining of any paper communications, memorandums, handwritten notes, desk pads, summaries and other writings and instruments relative to the plenary act of legislative downzoning and personal opinions of a Councilman on any item of legislation. Accord, Stump v. Grand Lodge, 45 Md. App. 263, 412 A.2d 1305 (1980). This privilege also extends to a holographic note, memorandum or record made by a Councilman's aide for the use of the Councilman. Stated otherwise, the evidentiary aspect of the immunity doctrine affords a County Councilman a privilege to refuse to answer any form of discovery

in a civil case, including a request for the production of documents or Subpoena Ducus Tecum. Accord, see County Council for Montg. Co. v. District Land Corp., 294 Md. 691, 337 A.2d 712 (1975); and Blondes v. State, supra.

The authorities support the County's position as to the protection afforded by the immunity doctrine as to legislative conduct, including the keeping and maintaining of personal notes, memoranda or other type of record made or taken within the sphere of legitimate legislative activity. Indeed, such conduct, including personal note-taking and keeping, is as legislation itself and inquiry is prohibited into those things said or done in the performance of official legislative duties and the motivation for those acts. United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 36 L.Ed.2d 507 (1972); Blondes v. State, supra.

Although it has been held that FRCP 34, the analogous rule to Md. Rule 2-422 (derived from former Rule 419 and FRCP 34) should be liberally construed, the general rule of liberal discovery applying to documents and other types of discovery should not be applied inflexibly where, as here, there is a valid claim of privilege. Lever Bros. Co. v. Proctor and Gamble Mfg. Co., 38 F. Supp. 680 (D. Md., 1941); see also Wright, Federal Courts, Section 87, "Production of Documents" (Rule 34, the analogous rule in federal practice, permits inspection where relevant to subject matter and not privileged).

- 2A. LEGISLATIVE IMMUNITY OPERATES IN CIVIL PROCEEDINGS TO PREVENT INQUIRY INTO LEGISLATIVE ACTS OR MOTIVATION FOR THOSE ACTS; IT PRECLUDES ANY SHOWING OF HOW A LOCAL LEGISLATOR VOTED, ACTED, OR DECIDED ON MATTERS WITHIN THE SPHERE OF LEGITIMATE LEGISLATIVE ACTIVITY.

- 2B. THE NECESSARY COROLLARY TO THIS ABSOLUTE IMMUNITY FROM SUIT IS A PRIVILEGE FROM ANY FORM OF DISCOVERY, INCLUDING A MOTION TO PRODUCE THE PERSONAL NOTES, MEMORANDA OR OTHER RECORDS FOR PURPOSES OF DELVING INTO A LEGISLATOR'S THOUGHTS OR ACTIONS.

On the subject of legislative privilege, it is proper to quote from the opinions of this Court: "Maryland law holds that the judicial branch of government cannot institute an inquiry into the motives of the legislature in the enactment of laws, less the legislature be subordinated to the courts. County Council v. District Land, 274 Md. 691, 734 (1974). Zoning decisions which are made during a comprehensive rezoning process are strongly presumed to be correct. When a County Council engages in the legislative function of comprehensive rezoning, it exercises what has been described as its 'plenary' legislative power. That power is broad and is limited only by the constitutional restriction that the Council's action bears a substantial relationship to the public health, comfort, order and safety, convenience and general welfare. Stump v. Grand Lodge, 45 Md. App. 263, 269 (1980). Accord, 5 McQuillin, The Law of Municipal Corporations, Sections 16.90 and 16.91 at pp. 266-273 (3rd Ed. 1961)..." Lindberg, et al v. Baltimore County, Md., Baltimore County Circuit Court Case No. 9/245/85 - CG-1210, incorporated into Frank Lindberg, et al v. Baltimore County, et al, No. 700, Sept. Term 1986, Unreported in the Court of Special Appeals, Jan. 21, 1987 (attached hereto).

In addition absolute immunity has been extended to public officials exercising the legislative function in the following instances: Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (state supreme court justices acting in a legislative capacity); Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (members of a bi-state

regional agency acting in a legislative capacity); Stump v. Sparkman, 345 U.S. 349 (1978), and Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislator). Moreover, the clear trend of law is that local officials acting in a legislative capacity, have absolute immunity; accord, see Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980) (county councilors); Gorman Towers, Inc. v. Bogoslansky, 626 F.2d 607 (8th Cir. 1980) (city directors); Latino Political Action Committee v. City of Boston, 581 F. Supp. 678, (D. Mass., 1984) (city councilors); Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (D. Va., 1979) (county supervisors and planning commission); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978) (county commissioners); Ligon v. State of Md., 448 F. Supp. 935 (D. Md. 1977) (local legislators).

In Ligon v. State of Maryland, supra (downzoning from light industrial to rural residential during the 1971 Montgomery County comprehensive process did not amount to a taking or denial of due process; see also County Council v. District Land Corp., supra) plaintiffs sought to impose personal liability on council members for a downzoning which the Maryland Court of appeals found constitutionally valid (see District Land, supra) contending that Council's actions violated rights assured under 42 U.S.C. Section 1983. Speaking through Judge Blair, the District court for the District of Maryland held that local legislators are immune from any judicial deterrent whatever to the uninhibited discharge of their lawful legislative duty not obviously on account of their private indulgence, but for the public good. A successful attempt to collaterally impugn the Council's motives would subordinate the role of the legislative branch in contravention of our form of government. Tenney v. Brandhove, 341 U.S. 377, 71 S.Ct. 783, 95 L.Ed. 1103, 1024 (1953) (the protection of the

speech or debate clause is not limited to words spoken in debate, but is applicable to written reports, to resolutions offered, to the act of voting and to all things generally done in a session of the House by one of its members in relation to the business before it; Legislative Reference Service, Constitution of the United States of America, pp. 99, 100 citing Coffin v. Coffin, 4 Mass. 01 (1808)). In Ligon, supra, it was observed that at a very early time, the Supreme Court in Fletcher v. Peck, 6 Cranch (10 U.S.) 87, 130, 3 L.Ed. 162 (1810) held that it was not consonant with our scheme of government for a court to inquire into the motives of legislators. In Ligon, municipal legislators were absolutely immune from damages when acting under color of State law for actions taken within the scope of their valid legislative authority; see also Athanson v. Grasso, 411 F. Supp. 1153, 1160 (D. Conn., 1976).

Discussing the doctrine of legislative immunity, the U.S. District Court for the District of Maryland, in United States v. Mandel, 415 F. Supp. 1025 (1976) (J. Murray) (indictment which managed to allege proscribed conduct beyond the pale of any legislative privilege), referred to the congressional speech and debate clause (Article 1, Section 6 of the United States Constitution, "for any speech or debate in either House [Senators or Representatives] shall not be questioned in any other place." The Court also referred to the analogous provision in the Maryland Constitution found in Article 10 of the Maryland Declaration of Rights which, in fact, predates the federal provision; accord, Niles, Maryland Constitutional Law, "[Article X] corresponds with the provision in Section 6 of Article 1 of the Federal Constitution that 'for any speech or debate in either House, they (i.e., Senators and Representatives) shall not be questioned in any other place' and although slightly different in language has

practically the same meaning." pp. 13, 22; see also p. 143 (Article III, Section 18, is analogous to Section 6 of Article I of the Federal Constitution). Citing the doctrine of legislative immunity predicated on the speech and debate clauses in the United States and Maryland Constitutions, the U.S. District Court in U.S. v. Mandel, supra, held that legislative immunity operates in civil proceedings to prevent inquiry into legislative acts or the motivation for those acts; it precludes any showing of how a local legislator voted, acted, or decided on matters within the sphere of legitimate legislative activity; Tenney v. Brandhove, 341 U.S. 367, 372, 71 S.Ct. 783, 786, 95 L. Ed. 1019, 1024 (1951); United States v. Brewster, 408 U.S. 501, 92 S.Ct. 7531, 33 L.Ed.2d 507 (1972). The evidentiary aspect of the doctrine of legislative immunity affords legislators a privilege to refuse to answer any questions concerning their legislative acts in any proceeding outside of the legislature, U.S. Constitution, Article 1, Section 6; Maryland Constitutions. The necessary corollary to this absolute immunity from suit is a privilege from any form of discovery, including a motion to produce documents for purposes of delving into a legislator's thought processes, motivations, and deliberations regarding either Council Bills 139-84 & 150-88 or any other item of legislation; see Searington Corp. v. Inc. Village of North Hills, 575 F. Supp. 1295, 1298 (E. D. N.Y. 1981) citing United States v. Mandel, 415 F. Supp. 1025, 1027-1030 (D. Md. 1976); see also Article XI-A, Sections 2 and 3, Md. Constitution, Article 29A, Section 5(X), Md. Annotated Code, 1957, and Charter Sections 304 and 306.

Citing Maryland Declaration of Rights, Article 10, and Md. Constitution, Article III, Section 18, the Maryland Court of Appeals (Chief Judge